United States Court of Appeals

for the Second Circuit

APPENDIX

76-6030 & 76-6036

United States Court of Appeals

For the Second Circuit.

B

P/S

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, As Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

UNITED STATES COURT OF APPEALS
FILED
APR 1 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITE STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of Elizabeth M. Haas, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

- -X

DOCKET ENTRIES.

Date	Proceedings
1970	
Oct. 2	Filed complaint-issued summons-original-4 copies & del'vd to Marshal for service
Oct. 12	Filed Summons served October 6, 1970 on Brian Mumford, Asst. U.S. Attorney; served October 5, 1970 on the Attorney General by certified mail
Dec. 9	Filed Answer of Defendant with demand for Trial by Jury and Affidavit of Service by Mail
Dec. 9	Filed Defendant's Interrogatories to Plaintiffs with Affidavit of Service by Mail

DOCKET ENTRIES

Date	Proceedings
1971	
Jan. 4	Filed Plaintiff's Answers to Defendant's Interrogatories and Exhibits A, B and C
Dec. 21	Filed Plaintiff's Note of Issue - May 1972 - Auburn, - Jury
1972	
July 11	Filed Plaintiff's Note of Issue - September 1972 - Syracuse - Jury
1973	
Mar. 12	Filed Plaintiff's Note of Issue - May 1973 - Auburn - Jury
1974	
Jan. 10	Off the Dismissal calendar
Mar. 29	Alert notices mailed
Apr. 12	Filed Plaintiff's Note of Issue - May 1974 - Auburn-Court
July 30	Filed Stipulation of Facts
July 31	Filed Findings of fact and conclusions of law
Aug. 5	Filed Proposed findings of fact
Aug. 20	TRIAL. Witnesses for plaintiffs. Decision reserved. Judge Port allows government 30 days to file Memorandum of Law after transcript is received. Plaintiff to have 2 weeks thereafter to reply
Oct. 22	Filed brief for the defendant

DOCKET ENTRIES

Date	Proceedings
1975	
Dec. 12	Filed Memorandum-Decision and Order of Judge Port, dated Dec. 10, 1975 that the claim of the plaintiff, Watertown Cemetery Association is dismissed for lack of jurisdiction and that judgment be granted in favor of the defendant, United States of America and against the plaintiff executors of the Last Will and Testament of Elizabeth M. Haas, deceased, dismissing the complaint on the merits.
Dec. 12	Filed Judgment and mailed cards, Re: Judgment to Willmott, Aylward, Wisner, McAloon & Scanlon, Esqs., Conboy, McKay, Bachman & Kendall, Esqs., and Hon. James M. Sullivan, Jr., U. S. Attorney, ATTN: STEPHEN T. LYONS
1976	
Jan. 13	Off dismissal calendar.
Feb. 5	Filed Notice of Appeal by plaintiff Watertown Cemetery Association
Feb. 5	Filed Notice of Appeal by plaintiff The National Bank of Northern New York
Feb. 26	Filed Civil Appeal Scheduling Order
Mar. 2	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
Mar. 4	Filed Receipt for Papers sent to C.C.A.
Mar. 11	Filed Reply Brief for Plaintiffs
Mar. 11	Filed copy of letter from Henry H. Willmott to Hon. Edmund Port, dated Oct. 29, 1974
Mar. 11	Filed Trial Brief of Plaintiffs
Mar. 11	Filed transcript of proceedings held Aug. 20, 1974 at Auburn before Judge Port

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

Civil Action No. 70-CV-345

Notice is hereby given that plaintiff, THE NATIONAL BANK OF NORTHERN NEW YORK, sole surviving Executor of the Last Will and Testament of Elizabeth M. Haas, deceased, hereby appeals to the United States Court of Appeals for the Second Circuit from the order and final judgment dismissing the complaint of the plaintiffs entered in this action on December 12, 1975.

Dated: February 4, 1976.

HENRY H. WILLMOTT
Attorney for Plaintiff THE NATIONAL BANK OF NORTHERN NEW YORK, as Executor of the Last Will and Testament of Elizabeth M. Haas, Deceased,
425 Washington Street
Watertown, New York 13601
Telephone: 315-782-3200

TO: Joseph R. Scully, Esq., Clerk
United States District Court
Northern District of New York
Federal Building
Utica, New York 13503

NOTICE OF APPEAL BY PLAINTIFF WATERTOWN CEMETERY ASSOCIATION.
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

70-CV-345

NOTICE IS HEREBY GIVEN, that Watertown Cemetery Association, one of the plaintiffs above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment and from the order dismissing the claim of the plaintiff, Watertown Cemetery Association, for lack of jurisdiction, entered in this action on the 12th day of December, 1975.

Dated: February 4, 1976

Conboy, McKay, Bachman & Kendall

By: Terrence Conboy
Partner

Attorneys for Watertown Cemetery Association
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Telephone: (315) 788-5100

JUDGMENT APPEALED FROM.

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 70-CV-345

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This action came on for trial (~~hearing~~) before the Court, Honorable Edmund Port, United States District Judge, presiding, and the issues having been duly tried (~~heard~~) and a decision having been duly rendered,

It is Ordered and Adjudged that the claim of the plaintiff, Watertown Cemetery Association is dismissed for lack of jurisdiction and that judgment be granted in favor of the defendant, United States of America and against the plaintiff executors of the Last Will and Testament of Elizabeth M. Haas, deceased, dismissing the complaint on the merits.

Dated at Utica, New York, this 12th day of December, 1975.

J. P. Scully

Clerk of Court

MEMORANDUM-DECISION AND ORDER.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

Plaintiffs

vs.

UNITED STATES OF AMERICA,

Defendant.

70-CV-345

APPEARANCES:

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Of Counsel

EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

This is a refund action for the recovery of estate taxes allegedly erroneously and illegally assessed and collected from the plaintiffs, in the sum of $916,085.78, by the executors of the es-

tate of Elizabeth M. Haas. Jurisdiction is based on 28 U.S.C. § 1346(a)(1).[1]

The parties have agreed on an extensive stipulation of facts. In addition, testimony of one witness called by the plaintiff was presented.

Facts

The plaintiff, The National Bank of Northern New York, is the surviving executor of the will of Elizabeth M. Haas, who died on January 15, 1966. Ruth K. Child is a co-executor of the will, but is now deceased. The dispute in this case arises out of the following bequests to the Grove and Watertown Cemetery Associations:

> EIGHTH: I give and bequeath to GROVE CEMETERY ASSOCIATION of LaFargeville, New York, the sum of Twenty-Five Thousand Dollars ($25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery.
>
> TWENTY-FIRST:
>
> All the rest, residue and remainder of my property, real and personal of every name and nature, I give, devise and bequeath to THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF TRINITY CHURCH, Watertown, New York and THE WATERTOWN CEMETERY Association, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used.

The Watertown and Grove Cemetery Associations are corporations governed by the New York State Not-For-Profit Corporation Law. On April 3, 1967, the Haas executors filed with the Internal Revenue Service an estate tax return and paid a tax of $106,644.33. On

MEMORANDUM-DECISION AND ORDER

June 27, 1967, the Internal Revenue Service assessed against the estate an additional estate tax in the amount of $920,367.36, which was paid by the executors under protest, with $14,713.27 interest, on July 23, 1967. The executors filed with the Internal Revenue Service a claim for refund on April 2, 1969 and, on April 9, 1970, filed an amended claim for refund of $935,096.66 of estate tax and interest already paid. In June, 1970, the executors were advised by the Internal Revenue Service that their claim had been disallowed to the extent of $917,593.37. On or about August 21, 1970, the executors received a refund of $19,010.88 and interest of $3,487.58. The present action is brought to recover the difference of $916,085.78 between the claim for refund and the amount of refund actually made. The difference represents the additional tax resulting from the disallowance of deductions to the cemeteries under 26 U.S.C. § 2055(a)(2)(3)[2] then in effect. The action was commenced timely.

The Issue

The issue before the court is whether the estate of Elizabeth M. Haas is entitled to a deduction for her bequests to the Grove Cemetery Association and the Watertown Cemetery Association pursuant to the provisions of 26 U.S.C. § 2055(a).

Plaintiffs' Contentions

The plaintiffs primarily contend that the Grove Cemetery Association and the Watertown Cemetery Association are charitable entities within the meaning of 26 U.S.C. § 2055(a). Therefore, the Haas estate is entitled to an estate tax deduction approximately equal to the bequests to the Cemetery Associations.[3] The plaintiffs

MEMORANDUM-DECISION AND ORDER

Alternatively contend that the bequests are to be used for religious purposes, which would also entitle the estate to a deduction under § 2055(a). Plaintiffs argue that the funds bequeathed to the Cemetery Associations are held in trust, rather than outright. Nevertheless, the plaintiffs also contend that, if the court determines that the funds are held outright, the estate is still entitled to a deduction.

Defendant's Contentions

Whether the bequested funds are held in trust or outright is considered of no importance by the defendant, United States. The defendant alleges, simply, that the Cemetery Associations are neither charitable nor religious within the meaning of 26 U.S.C. § 2055(a).

Additionally, the Government contends that the Watertown Cemetery Association named as a plaintiff is not a proper party to this suit. It is the Government's position that only the taxpayer, here the estate, is permitted to bring an action under 28 U.S.C. § 1346(a)(1).

The parties have stipulated that $2,000.00 is the amount required to establish a fund to provide for perpetual care of the Frederick Watterhahn Family plot in the Grove Cemetery. That sum is, accordingly, removed from this controversy.

Discussion

Charitable Purposes

The plaintiffs rely heavily on the case of Dulles v. Johnson, 273 F.2d 362 (2nd Cir. 1959) cert. denied, 364 U.S. 834 (1960). The Dulles case involved the estate of William Nelson Cromwell, a prominent New York City attorney. Cromwell specified in his will that the residue of his estate was to be divided among various groups and

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organizations. These organizations included the New York County Lawyers Association, the Association of the Bar of the City of New York, and the New York State Bar Association. The executors of the Cromwell estate filed a federal estate tax return, in which they claimed deductions from the gross estate for the bequest to the three bar associations. The executors claimed that the associations were "charitable, scientific, literary or educational" within the meaning of § 812(d) of the 1939 Internal Revenue Code, 26 U.S.C. § 812(d). Section 812(d) was the predecessor of 26 U.S.C. § 2055(a). In holding the bequests deductible under § 812(d), the Court of Appeals considered the activities of the Bar Associations and, with regard to the Associations' regulation of the unauthorized practice of law, stated at 273 F.2d 366:

> If these activities were not undertaken by the Associations, the cost of this necessary regulation would descend upon the public. Hence we conclude that as to regulation of the unauthorized practice of law the Associations must be deemed "charitable."

The Court of Appeals went on to conclude at page 368:

> Looking at the total operations of the three Bar Associations we hold that they are "charitable, scientific ***[and] educational" within the meaning of Section 812(d) and that the district court erred in disallowing deductions for the bequest to them. The judgment is reversed with respect to the disallowance of the deductions.

Plaintiffs contend that, like the Bar Associations they, too, lessen the burden of government and, therefore, are charitable. Plaintiffs' Trial Brief at page 25 states:

> The principle laid down in Dulles v. Johnson is the whole point in the case presented. (emphasis added) We contend that the sole purpose for which Watertown Cemetery Association can use the income from the Haas bequest is the furnishing of a place to bury the dead, and the care and maintenance of that place; that if this activity were not under-

> taken by Watertown Cemetery Association and like associations, the cost thereof would devolve upon the public, since it is unthinkable that there would be no place to bury the dead; that the conclusion is therefore inescapable that this purpose is charitable within the meaning of Section 2055(a)(3) I.R.C.; and that therefore this estate is entitled to a charitable deduction in the amount of the Haas bequest.

The force of plaintiffs' argument, although having a certain surface appeal, weakens upon examination. A corporation can qualify as exempt from paying income taxes and be considered as operating for a charitable purpose under 26 U.S.C. § 501(c)(3) upon the theory of a "[l]essening of the burdens of government."[4] As will be developed later, § 501(c)(3) and the supplementing regulations do not apply to estate taxes.

The plaintiffs find support for the "[l]essening of the burdens of government"--charitable nexus in Dulles and other cases cited. Dulles and the plaintiffs' supporting cases are distinguishable factually from the case at bar. None relate to a charitable deduction claimed by a cemetery association.[5] The facts indicating a "[l]essening of the burdens of government" found in the cases granting deductions are not found here. Unlike the Dulles case, here, even the cost of burial of the indigent "descend[s] upon the public".[6] In the few cases in which a charitable deduction from an estate tax was sought by reason of a charitable contribution to a cemetery association, the courts have refused to allow it.[7]

Statutory Treatment of Cemetery Associations

The manner in which Congress has specifically dealt with cemetery associations in the taxing statutes is significant. In 26 U.S.C. § 501(c)(3), "religious, charitable, scientific,..." corporations are

exempted from the paying of income tax. In a separate section, 26 U.S.C. § 501(c)(13) nonprofit cemetery companies are also exempted. Section 170(c)(2) provides that a contribution or gift to a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals" is to be allowed as an income tax deduction. Again, in a separate paragraph, 26 U.S.C. § 170(c)(5) specifically provides that a gift to a nonprofit cemetery company is, likewise, made deductible. Congress' continued separate treatment of charitable corporations and cemetery associations strongly suggests that the legislature views them as separate and distinct entities. This view is clearly demonstrated in the legislative history of the 1954 Internal Revenue Code. The 1939 Internal Revenue Code contained a provision similar to § 170(c)(2), but did not contain a provision similar to § 170(c)(5), dealing with deductions for contributions to cemetery associations. The Senate report on the Internal Revenue Code of 1954 states with reference to § 170(c)(5):

> Your committee's bill extends the deduction for charitable contributions beyond those allowed under present law to contributions made to non profit cemetery and burial companies. (1954 U.S. Code Congressional and Administrative News, 4660) (See, also, 1954 U.S. Code Congressional and Administrative News, 4843-46, 5289).

The provisions of the Internal Revenue Code which pertain to the instant case are 26 U.S.C. §§ 2055(a)(2), (3). These two sections deal with estate tax deductions for contributions to either a corporation or to a trustee, where the corporation is organized and operated for "religious, charitable, scientific, literary, or edu-

cational purposes..." or where the trustee will use the gift for "religious, charitable, scientific, literary or educational purposes. ..." This language is virtually identical to 26 U.S.C. § 170(c)(2) and 26 U.S.C. § 501(c)(3). However, in the estate tax area, there is no separate section dealing with cemetery associations; nor has a regulation paralleling 26 C.F.R. § 1.501(c)(3)-1(d)(2) as interpreted in Revenue Ruling 69-545[8] been promulgated and adopted applying the community benefit concept to cemetery association legatees under § 2055(a). Where Congress has wished to provide for special tax treatment of cemetery associations, it has done so specifically; the absence of a provision dealing with cemetery associations in the estate tax area is highly significant. The latest case to deal with this problem is The Bank of Carthage v. United States, 304 F.Supp. 77 (W.D. Missouri 1969). In The Bank of Carthage case, one John Carter devised real property known as the Oak Hill Cemetery in trust for the operation and improvement of the Cemetery. The executor of the Carter estate took the position that the devise of the Cemetery was not subject to estate tax because it was a charitable transaction. The federal government disagreed, and an estate tax deficiency was assessed. The Bank of Carthage, as trustee under the will, then brought an action against the United States to recover the deficiency which it had paid. The contentions of the Bank of Carthage in that case are similar to the arguments made by the plaintiffs here. In Carthage, the executor argued that the Oak Hill Cemetery was charitable within the meaning of 26 U.S.C. § 2055(a)(2). Carter's executor reasoned that, inasmuch as the Internal Revenue Service had granted the Oak Hill Cemetery an exemption from federal income tax under the provisions of 26 U.S.C. § 501(c)(13), the same

type of exemption should apply in the estate tax area. The Carthage court, however, found for the United States. It first pointed out that "[a] non-profit cemetery is not per se qualified for the estate tax exemption of Section 2055(a)(2) as that law is presently written". Answering the plaintiff's argument based on § 501(c)(13), the court responded at pages 80-81:

> The short answer is that the estate tax statutes do not contain the counterpart of income tax Section 501(c)(13). Its absence in the estate tax statutes, illustrates if anything, an intent by Congress not to include as an estate tax exemption, the exemption set out in Section 501(c)(13) to estate tax situations. ...It is exclusively the province of Congress in its wisdom to determine whether it wishes to provide in its estate tax statutory exemptions all those appearing in its statutory income tax exemptions.

Thus, on facts very similar to those present in the instant case, an estate tax deduction was not allowed.

In Gund's Estate v. Commissioner of Internal Revenue, 113 F.2d 61 (6th Cir.) cert. denied, 311 U.S. 696 (1940), an estate tax deduction equalling the value of a bequest to the Oak Grove Cemetery Association was also disallowed. While the Gund case dealt with a predecessor to 26 U.S.C. § 2055(a), its reasoning is applicable to the instant case. At 113 F.2d 63-64, the Gund court stated:

> As was stated by the Board of Tax Appeals in Craig v. Commissioner, 11 B.T.A. 193,200: "* * From the first revenue act to the last, Congress has consistently and persistently placed charitable and religious institutions in one class and cemeteries not operated for gain in a distinct and separate class; that wherever provision has been made permitting deduction by individuals of gifts and contributions, one class has been included and the other not mentioned; and, finally, when Congress determined that it was proper that income paid to or set aside for such cemeteries should be permitted as a deduction, such intention was made evident in no uncertain manner and such cemeteries were described with most meticulous exactness. We should not join together classes which Congress has seen fit to put asunder.

> Looking to all the provisions of the Revenue Act of 1921, we find that Congress did not include cemeteries not operated for gain in the category of religious or charitable corporations and that this intention runs through all the revenue acts enacted prior and subsequent to the Revenue Act of 1921."
>
> While the Schuster and Craig cases dealt with income rather than estate tax, we are of the opinion that this does not affect the validity of the reasoning therein.

The legislative history and the cases which deal with estate tax deductions for contributions to cemetery associations make it transparently clear that cemetery associations per se are not charitable or religious within the meaning of 26 U.S.C. § 2055(a).

The Gund court observed at 113 F.2d 62 that "[a] cemetery association doubtless could be so organized and operated as to be a charitable organization within the meaning of the act....".

The record in this case considered as a whole fails to disclose activities warranting such a finding. The Cemetery Associations did not make it a practice of providing free burial to indigents, nor is it their usual custom to provide any plots at reduced prices. At paragraph 34 of the stipulation of facts, the plaintiffs outline a list of activities which might arguably bring them within the Act. However, most of the activities cited were done long ago and, certainly, are not a continuing practice of the Associations. The plaintiffs point out that the Watertown Cemetery Association provides a receiving vault where the remains of persons dying during the winter months may be stored. The Association allows other cemeteries and the City to use this facility. However, at the time of the hearing, it was disclosed that the Watertown Cemetery Association makes a charge for the use of their storage facility.[9] Plaintiffs also point out that there are a number of grave sites for which no contribution

was ever made into the perpetual care fund or for which the contribution made is now insufficient to provide for upkeep. Nevertheless, the Cemetery Associations maintain these plots. The Cemetery Associations do not pay for this care themselves, however; it is made possible by the contribution of others.[10] On all of the above, I find that the Watertown and Grove Cemetery Associations are neither charitable corporations nor established exclusively for charitable purposes within the meaning of 26 U.S.C. § 2055(a).

Religious Purposes

The plaintiffs also contend that the Cemetery Associations perform a religious function and, therefore, are entitled to an estate tax deduction under § 2055(a). The plaintiffs' expert, Doctor Milton Gatch, Professor and Chairman of the Department of English at the University of Missouri, gave his opinion, as a religious expert, subject to objection, that a not-for-profit cemetery corporation which furnishes and maintains a place for the interment of dead human bodies performs a religious function or purpose. Having reserved my ruling on the admissibility of Doctor Gatch's deposition[11] and written statement,[12] they are received. I find the Cemetery Associations here are not "religious" in fact or within the meaning of § 2055(a).

The same reasoning, applied earlier, which precludes a cemetery association from being a charitable entity within the meaning of § 2055(a) likewise precludes a cemetery association from being religious for estate tax purposes. Congress has continuously treated religious institutions and cemeteries as separate and distinct entities and it has chosen not to include contributions to the latter as estate tax deductions. Moreover, the record here indicates that

the Watertown and Grove Cemetery Associations, in actuality, perform no religious functions. The Cemetery Associations provide for the care and maintenance of the cemetery grounds. At the time of a burial, employees of the Associations dig the grave, provide and man the lowering device and later fill the grave. Any prayers or religious ceremonies performed in connection with the burial are performed by clergymen or others in no way associated with the Cemetery Associations. The Cemetery Associations are not affiliated with any church, and plaintiffs' counsel pointed out that the Cemetery Associations refused burial to no one and that an atheist would absolutely be allowed burial in the Cemeteries involved.[13]

In his written statement, Doctor Gatch actually concludes that cemetery associations are charitable, not religious.[14] As noted before, this is one formof charity that Congress has not seen fit to include in 26 U.S.C. § 2055(a). The expert's opinion as to what constitutes religious purposes is so broad and amorphous as to render it meaningless for tax exemption purposes. He virtually equates it with goodness. The Watertown and Grove Cemetery Associations are not operated exclusively for religious or charitable purposes, nor were the bequests to them to be used exclusively for such purposes within the meaning of § 2055(a).

Cemetery Association as Plaintiff

The defendant, United States, contends that the Watertown Cemetery, named as a plaintiff, is not a proper party to this suit. The Government argues that only the taxpayer, here the estate, is permitted to bring an action under 28 U.S.C. § 1346(a)(1). The

Government's position finds support in this and other circuits. The Watertown Cemetery Association will be dropped as a plaintiff and its cause of action against the United States dismissed for lack of jurisdiction.

Findings of Fact and Conclusions of Law

The facts set forth in a written stipulation of the parties, a copy of which is attached hereto and made a part hereof, as supplemented by the findings of fact and conclusions of law in this Memorandum-Decision and Order shall constitute the findings of fact and conclusions of law pursuant to Rule 52 F.R.Civ.P.

I conclude that:

(1) except as to the claim of the plaintiff, Watertown Cemetery Association, the court has jurisdiction of the parties and subject matter of this action;

(2) the bequests in issue are not deductible from the gross estate of Elizabeth M. Haas under 26 U.S.C. § 2055(a)(2) or (3); and

(3) judgment should be entered in favor of the defendant, United States of America, dismissing the complaint herein.

For the reasons herein, it is hereby

ORDERED, that the claim of the plaintiff, Watertown Cemetery Association be and the same hereby is dismissed for lack of jurisdiction; and it is further

ORDERED, that judgment be granted in favor of the defendant, United States of America and against the plaintiff executors of the Last Will and Testament of Elizabeth M. Haas, deceased, dismissing the complaint on the merits.

Edmund Port
United States District Judge

Dated: December 10, 1975
Auburn, New York

MEMORANDUM-DECISION AND ORDER

F O O T N O T E S

[1] (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

[2] §.2055(a) In General.--For purposes of the tax imposed by Section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)--

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or

by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation;

[3] The bequests total approximately $2.5 million.

[4] See, 26 C.F.R. § 1.501(c)(3)-1(d)(2).

[5] Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), cert. granted, 43 U.S.L.W. 3613 (U.S. May 19, 1975)[Revenue Ruling 69-545, which defines criteria necessary for a nonprofit hospital to qualify as a charitable organization under 26 U.S.C. § 501(c)(3)(Income Tax Exemption) is upheld]; St. Louis Union Trust Co. v. United States, 374 F.2d 427 (8th Cir. 1967)(Bar association held charitable within meaning of 26 U.S.C. § 2055(a) on facts similar to Dulles); Kaplun v. United States, 303 F.Supp. 733 (D.C. N.Y. 1969), aff'd, 436 F.2d 799(2d Cir. 1971)[Bequest to State of Israel of coin collection, to be exhibited in a museum qualified for a charitable deduction under 26 U.S.C. § 2055(a)]; Krohn v. United States, 246 F.Supp. 341 (D.Colorado 1965)(Denver Medical Society not operated exclusively for charitable purposes under 26 U.S.C. § 2055(a); estate tax deduction denied); Hammerstein v. Kelley, 235 F.Supp. 60 (E.D. Missouri 1964), aff'd, 349 F.2d 928 (2d Cir. 1965)(St. Louis Medical Society not operated exclusively for charitable purposes under

26 U.S.C. § 2055(a), estate tax deduction denied); Industrial National Bank of Providence v. United States, 187 F.Supp. 810 (D. Rhode Island 1960)[Providence Art Club operated exclusively for educational purposes, including the encouragement of art; estate tax deduction allowed under 26 U.S.C. § 2055(a)]

6 Stipulation of Facts, ¶39.

7 Gund's Estate v. Commissioner of Internal Revenue, 113 F.2d 61 (7th Cir.), cert. denied 311 U.S. 696 (1940); Carthage v. U.S., 304 F.Supp., 77 (W.D. Mo. 1969); but see, Estate of Elizabeth L. Audenried v. Commissioner of Internal Revenue, 26 T.C. 120, acquiesced in by the Commissioner, 2 C.B. 4 (1956)(estate tax deduction in the amount of bequest to a church-affiliated cemetery allowed on grounds that cemetery was religious within meaning of estate tax statute).

8 See, Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), cert. granted 43 U.S.L.W. 3613 (U.S. May 19, 1975).

9 Transcript, page 52.

10 See, Statement of Plaintiff's Attorney, Transcript, page 21.

11 Plaintiffs' Exhibit 1.

12 Plaintiffs' Exhibit 1A.

BEST COPY AVAILABLE

[13] Transcript, page 22.

[14] Plaintiffs' Exhibit 1A, A Statement on the Religious Functions of Cemeteries, pages 9-10.

[15] Eighth Street Baptist Church, Inc. v. United States, 431 F.2d 1193 (10th Cir. 1970); Philips v. United States, 346 F.2d 999 (2nd Cir. 1965); First National Bank of Emlenton, Penn. v. United States, 265 F.2d 297 (3rd Cir. 1959). See, Hofheinz v. United States, 511 F.2d 661 (5th Cir. 1975).

COMPLAINT.

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION,

CIVIL ACTION NO. 70-CV-345

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.

C O M P L A I N T

1. The Plaintiff Ruth K. Child is a citizen of the United States residing at Hotel Woodruff, Watertown, New York, and the Plaintiff The National Bank of Northern New York is a national banking corporation having its principal office at 200 Washington Street, Watertown, New York, and they by virtue of letters testamentary issued to them by the Surrogate's Court of Jefferson County, New York, on November 30, 1966 and still in effect are the Executors of the Last Will and Testament of Elizabeth M. Haas, late a resident of Watertown, New York, deceased.

2. The Plaintiff Watertown Cemetery Association is a cemetery corporation organized and existing under the law of the State of New York having its principal office at Hotel Woodruff, Watertown, New York.

COMPLAINT

3. The Defendant is the United States of America.

4. This is an action for the recovery of Federal Estate taxes paid by the Plaintiff Executors for the Estate of said Elizabeth M. Haas, and this Court has jurisdiction by reason of Title 28, U.S.C., Section 1346(a).

5. The Plaintiff Watertown Cemetery Association is a major beneficiary under the Will of said Elizabeth M. Haas and is a real party in interest herein because substantially all of the taxes for which this action is brought have been charged against and deducted from the residuary share of the Estate bequeathed to said Association by said Will.

6. On April 3, 1967 the Plaintiff Executors filed with the District Director of Internal Revenue at Buffalo, New York, a Federal Estate Tax Return for the Estate of Elizabeth M. Haas and on account of such return paid to said Director an estate tax amounting to $106,644.33.

7. On or about June 27, 1967 said District Director assessed against the said Estate additional estate taxes in the amount of $920,367.63 and on or about July 28, 1967 Plaintiff Executors paid said additional assessment and $14,713.27 interest thereon.

8. The Plaintiff Executors filed with said District Director on April 2, 1969 a Claim for Refund and on April 9, 1970 an Amended Claim for Refund of $935,096.66 of the estate taxes and interest so paid.

COMPLAINT

9. A true copy of said Claim and a true copy of said Amended Claim for Refund marked Exhibit A and Exhibit B respectively are attached hereto and made a part hereof.

10. During the month of June 1970 Plaintiff Executors were advised of the disallowance of said Claim and Amended Claim to the extent of $917,593.37 and on June 12, 1970 filed with the Internal Revenue Service a written waiver of the statutory notice of such disallowance.

11. Thereafter Plaintiff Executors received from the office of the Regional Commissioner, North Atlantic Region, Internal Revenue Service, a letter dated June 30, 1970 advising that the amount of the Federal Estate tax on said Estate had then been recomputed to be $1,008,300.21 and on or about August 21, 1970 Plaintiff Executors received on account of the taxes and interest theretofore paid by them a Refund of $19,010.83 and interest of $3,487.58 thereon.

12. The difference between the Claims for Refund duly filed and the amount of Refund allowed and paid to the Plaintiff Executors on or about August 21, 1970, all as aforesaid, namely $916,085.78 has been erroneously and illegally assessed and collected by the Internal Revenue Service and repayment thereof and interest thereon has been and now is wrongfully withheld from the Plaintiffs.

COMPLAINT

13. For a statement of the basis of their demand for relief in this action, Plaintiffs incorporate herein each and every allegation set forth in their Claim for Refund attached hereto as Exhibit A and in their Amended Claim for Refund attached hereto as Exhibit B except the allegations set forth in the paragraphs numbered 2 and 3 of said Claim Exhibit A and the paragraphs numbered 1, 2 and 3 of said Amended Claim Exhibit B, the portion of the Plaintiffs' Claims for Refund based on said numbered paragraphs having been allowed and paid by the Internal Revenue Service.

14. Plaintiffs are the sole owners of the claim for refund of such estate taxes for which this action is brought and have made no assignment of that claim.

WHEREFORE, Plaintiffs demand judgment in the amount of $916,085.78 or whatever greater amount may be legally refundable to them plus such interest and costs as are allowed by law and such other relief as the Court may deem just and proper.

Dated: September 28, 1970.

Henry H. Willmott
Attorney for Plaintiffs Ruth K. Child and The National Bank of Northern New York as Executors of the Last Will and Testament of Elizabeth M. Haas, Deceased.
425 Washington Street
Watertown, New York 13601
Telephone: 315-782-3200

COMPLAINT

Lawrence Conboy
Attorney for Plaintiff Watertown
Cemetery Association
407 Sherman Street
Watertown, New York 13601
Telephone: 315-788-5100

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury of all issues raised by the foregoing complaint which are so triable.

Henry H. Willmott
Attorney for Plaintiff Executors

Lawrence Conboy
Attorney for Plaintiff Watertown
Cemetery Association

EXHIBIT A, ATTACHED TO COMPLAINT--CLAIM.

Mailed to Int. Dept. 3/27/69 - Received Apr. 2, 1969

Form **843**
(Rev. June 1968)
U.S. Treasury Department
Internal Revenue Service

Claim

Director's Stamp
(Date received)

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- [X] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- [ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [ ] Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps: Ruth K. Child and The National Bank of Northern New York as Executors of the Estate of Elizabeth M. Haas, deceased, and Watertown Cemetery Association

Number and street: 6 Public Square

City or town, State, and ZIP code: Watertown, N. Y. 13601

Fill in applicable items—Use attachments if necessary

a. Your social security number | Wife's number, if joint return | b. Employer identification number (if any): 16-6066469

c. Internal Revenue Service office where return (if any) was filed: Buffalo, New York

d. Name and address shown on return, if different from above: Ruth K. Child, National Bank Bldg., Watertown, N.Y. The National Bank of Northern New York 200 Washington St., Watertown, N. Y.

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year: From ..... 19..., to ..... 19...

f. Kind of tax: Estate

g. Amount of assessment: $ 1,027,011.96

Dates of payment: April 3, 1967 paid $106,644.33; July 28, 1967 paid $920,367.63 plus int. of $14,713.27

h. Date stamps were purchased from Government

i. Amount to be refunded (If income tax, complete computation below): $ 935,096.66*

j. Amount to be abated (not applicable to income, estate, or gift taxes): $

k. The claimant believes that this claim should be allowed for the following reasons:

See statement attached

The original return herein was filed by undersigned executors and they still are acting in that capacity.

*or such greater amount as may be legally refundable, with interest

EXHIBIT A, ATTACHED TO COMPLAINT

COMPUTATION OF INCOME TAX REFUND	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Executor

Signed THE NATIONAL BANK OF NORTHERN NEW YORK, Executor
By [signature] Vice President
WATERTOWN CEMETERY ASSOCIATION
By [signature] President

Dated March 27, 1969

10— —1 SEE INSTRUCTIONS ON REVERSE Form 843 (Rev. 6-68)

EXHIBIT A, ATTACHED TO COMPLAINT

ATTACHED TO AND MADE A PART OF CLAIM (Form 843) FOR REFUND OF ESTATE TAX BY RUTH K. CHILD AND THE NATIONAL BANK OF NORTHERN NEW YORK AS EXECUTORS OF THE ESTATE OF ELIZABETH M. HAAS, DECEASED, AND WATERTOWN CEMETERY ASSOCIATION DATED MARCH 27, 1969.

1. The District Director of Internal Revenue erroneously disallowed taxpayers' claimed deduction for real estate taxes paid by the executors on decedent's real property located at 358 Franklin Street, Watertown, New York, for the purpose of preserving the same pending sale thereof, and for liquidating the same for purpose of distribution, as a reasonable expense of administration. The amount of such claimed deduction is computed as follows:

1966 City Tax paid July 22, 1966	$230.40
1966 School Tax paid Oct. 11, 1966	259.84
1967 County Tax paid Jan. 18, 1967	154.88
	$645.12
Less pro-rated amount received from purchaser on sale of realty on Mar. 21, 1967	256.66
Net taxes paid	$388.46

The probate of decedent's Will was being contested by two distributees, and the Will was finally admitted to probate, and the executors duly appointed by the Surrogate's Court of Jefferson County, New York, on November 30, 1966. The property was thereafter offered for sale at its appraised value of $14,000

but no offers at that amount were received until the offer of the eventual purchaser which was accepted and the sale consummated on March 21, 1967. The retention of the real property and the payment of taxes thereon until that date was reasonably required for the reasons and purposes above stated.

2. The District Director of Internal Revenue erroneously disallowed taxpayers' claimed deduction for broker's commission in the amount of $700.00 paid by the executors on the sale of decedent's real property above set forth. The sale of such real property was necessary to effect a distribution of the estate, and the broker's commission so paid was reasonable in amount and necessary to effect the sale.

3. The district Director of Internal Revenue erroneously disallowed taxpayers' claimed deduction in the amount of $2,000.00 representing payment by the executors to Trinity Church, Watertown, New York, of a pledged contribution in that amount made by decedent, by Ruth K. Child her attorney-in-fact, on November 19, 1965, pursuant to the authority vested in said attorney-in-fact by power of attorney theretofore duly executed by decedent. Such pledged contribution was made to a donee described in Section 2055 of the Internal Revenue Code for charitable purposes and would have constituted an allowable deduction had it been a bequest.

4. The district Director of Internal Revenue erroneously disallowed taxpayers' claimed deduction in the amount of $25,000.00 representing the bequest in that amount in Article

EXHIBIT A, ATTACHED TO COMPLAINT

EIGHTH of decedent's Will to Grove Cemetery Association of LaFargeville, New York. Such bequest reads in full as follows:

> "EIGHTH: I give and bequeath to Grove Cemetery Association of LaFargeville, New York, the sum of Twenty Five Thousand Dollars ($25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery."

Grove Cemetery Association was at the time of decedent's death, and still is, a New York membership corporation organized and operated exclusively for religious and charitable purposes, namely, the furnishing, embellishing and caring for sites and facilities for burial of the dead, no part of the net earnings of which inures to the benefit of any private stockholder or individual and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation.

In the alternative, Grove Cemetery Association is the Trustee of a trust created under decedent's Will as above set forth. The income only from such sum of $25,000.00 is to be used by Grove Cemetery Association exclusively for religious and charitable purposes, namely, the furnishing, embellishing and caring for sites and facilities for burial of the dead, and no substantial part of the activities of such trustee is carrying on propaganda or otherwise attempting to influence legislation.

By Article 9 of the Membership Corporations Law of the State

of New York, and especially Section 76 thereof, Grove Cemetery Association is limited in the use of all of its funds, and especially the above mentioned bequest, to certain specified purposes, all of which are religious and charitable within the meaning of Section 2055 of the Internal Revenue Code. Attention is called to Section 8-1.5 of the Estates, Powers and Trusts Law of the State of New York which provides that a bequest such as the above bequest to Grove Cemetery Association "shall be deemed to be for charitable and benevolent purposes".

5. The District Director of Internal Revenue erroneously disallowed taxpayers' claimed deduction of that portion of the residuary estate bequeathed in Article TWENTY-FIRST of decedent's Will to Watertown Cemetery Association thereby erroneously decreasing the amount of said deduction by $2,484,673.03 and erroneously increasing the taxable estate by that same amount.

The residuary bequest to Watertown Cemetery Association reads as follows:

> "All the rest, residue and remainder of my property, real and personal, of every name and nature, I give, devise and bequeath to THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF TRINITY CHURCH, of Watertown, New York, and THE WATERTOWN CEMETERY ASSOCIATION, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used."

Watertown Cemetery Association was at the time of decedent's death, and still is, a New York membership corporation, organized and operated exclusively for religious and charitable purposes, namely, the furnishing, embellishing and caring for sites

and facilities for burial of the dead, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

In the alternative, Watertown Cemetery Association is the Trustee of a trust created under decedent's Will as above set forth. The income only from such residuary bequest is to be used by Watertown Cemetery Association exclusively for religious and charitable purposes, namely, the furnishing, embellishing and caring for sites and facilities for burial of the dead, and no substantial part of the activities of such trustee is carrying on propaganda or otherwise attempting to influence legislation.

By Article 9 of the Membership Corporations Law of the State of New York, and especially Section 76 thereof, Watertown Cemetery Association is limited in the use of all of its funds, and especially the above mentioned bequest, to certain specified purposes, all of which are religious and charitable within the meaning of Section 2055 of the Internal Revenue Code. Attention is called to Section 8-1.5 of the Estates, Powers and Trusts Law of the State of New York, which provides that a bequest such as the above mentioned "shall be deemed to be for charitable and benevolent purposes".

6. There are presently pending in the Surrogate's Court of

EXHIBIT A, ATTACHED TO COMPLAINT

Jefferson County, and as yet not finally determined, three proceedings brought by (1) Laurence H. Kissel, an attorney at law of Watertown, New York, who represented the Jefferson County Association for the Blind, one of the legatees under decedent's Will, in the contested probate proceeding herein; (2) Fuller, Giles, Maloney, Marsh & Goodwin, attorneys at law of Watertown, New York, who represented the Rector, Churchwardens and Vestrymen of Trinity Church, one of the residuary legatees under decedent's Will, in said contested probate proceeding; and (3) Dunk, Conboy, McKay & Bachman, attorneys at law of Watertown, New York, who represented Watertown Cemetery Association, the other residuary legatee under decedent's Will, in said contested probate proceeding. These three proceedings seek an order of the Surrogate's Court, pursuant to Section 2110 of the Surrogate's Court Procedure Act of the State of New York, fixing and determining the amount of compensation to which these attorneys are entitled for their services, which are alleged to have benefited the estate, and to direct that the same be paid from the estate as expenses of administration. The total amount claimed is the sum of $30,450.00. When and if such amounts, or any part thereof, are allowed to said attorneys and paid by the estate, the same will constitute an allowable deduction for estate tax purposes and the amount of the estate tax attributable thereto is hereby claimed as a refund.

7. There will be additional expenses of administration, in-

cluding attorneys fees, incurred in the presentation of this claim for tax refund, and the action to be commenced thereon in the event such claim, or any part thereof, is disallowed. The amount of the estate tax attributable thereto is hereby claimed as a refund.

8. Watertown Cemetery Association is a party claimant herein for the reason that the amount of additional tax assessed against and paid by the estate on July 28, 1967 in the amount of $920,367.63 has been charged by the executors against the total amount of the residuary legacy of Watertown Cemetery Association, thereby causing the amount heretofore distributed and hereafter to be distributed to Watertown Cemetery Association to be reduced by the amount of such additional estate tax paid. The income earned on all of the assets of the estate has, since the payment of such additional estate tax, been distributed to the residuary legatees in the following proportions: to the Rector, Churchwardens and Vestrymen of Trinity Church 61% and to Watertown Cemetery Association 39%, the difference being caused by the reduced interest of Watertown Cemetery Association in the residuary estate by reason of the above mentioned charge. It has been agreed among the executors of the estate, the Rector, Churchwardens and Vestrymen of Trinity Church, and Watertown Cemetery Association that the total amount of tax refund attributable to the allowance of the claim made in paragraph 5 hereof, with interest thereon, shall be the sole property of Water-

EXHIBIT A, ATTACHED TO COMPLAINT

town Cemetery Association. Accordingly, Watertown Cemetery Association is the real party in interest herein as to the claim set forth in paragraph 5 hereof.

9. The amount of refund claimed is computed as follows:

GROSS ESTATE per Return Approved by District Director $6,228,111.04

Deductions per Schedules indicated:

	Allowed By District Director	Additional Claimed Herein	Total Per This Claim
"J" - Funeral & Administration	$ 434,759.83	$ 1,088.46	$ 435,848.29
"K" - Debts	57,818.90	2,000.00	59,818.90
	$ 492,578.73	$ 3,088.46	$ 495,667.19
"N" - Charitable Bequests	2,786,183.98	2,480,535.63	5,266,719.61
Total Deductions	$3,278,762.71	$2,483,624.09	$5,762,386.80
Statutory Exemption	60,000.00		60,000.00
TOTAL DEDUCTIONS & EXEMPTION	$3,338,762.71		$5,822,386.80

TAXABLE ESTATE as Here Claimed $ 405,724.24

Tax on Same after State Credit $106,628.57

EXHIBIT A, ATTACHED TO COMPLAINT

RECAPITULATION

Amounts Previously Paid by Claimants:	
April 3, 1967 - Per Return	$ 106,644.33
July 28, 1967 - Deficiency Assessed	920,367.63
" " " - Interest	14,713.27
Total Payments	$1,041,725.23
Correct Amount of Tax Per Above	106,628.57
REFUND NOW CLAIMED	$ 935,096.66*

*Subject to adjustment for additional administration expenses mentioned in paragraphs 6 and 7 above when any such expenses have been paid by the executors.

EXHIBIT B, ATTACHED TO COMPLAINT--AMENDED CLAIM.

Please return to H.H. Wilmoth

Form **843**
(Rev. Nov. 1968)
Department of the Treasury
Internal Revenue Service

Amended Claim

Director's Stamp
(Date received)

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- [X] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- [ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [ ] Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps: Ruth K. Child and The National Bank of Northern New York as Executors of the Estate of Elizabeth M. Haas, deceased.

Number and street: 6 Public Square

City or town, State, and ZIP code: Watertown, N. Y. 13601

Fill in applicable items—Use attachments if necessary

a. Your social security number:

Wife's number, if joint return:

b. Employer identification number (if any): 16-6066469

c. Internal Revenue Service office where return (if any) was filed: Buffalo, New York

d. Name and address shown on return, if different from above: Ruth K. Child, National Bank Bldg. Watertown, N.Y. The National Bank of Northern New York 200 Washington St., Watertown, N. Y.

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year: From ..... 19..., to ..... 19...

f. Kind of tax:

g. Amount of assessment: $ 1,027,011.96

Dates of payment: April 2, 1967 paid $106,644.33; July 28, 1967 paid $920,367.63 plus int. $14,713.27

h. Date stamps were purchased from Government:

i. Amount to be refunded (If income tax, complete computation below): $ 935,096.66*

j. Amount to be abated (not applicable to income, estate, or gift taxes): $

k. The claimant believes that this claim should be allowed for the following reasons:

See statement attached.

This is an Amended Claim. A prior Claim dated March 27, 1969 for a refund in the same amount was filed with the District Director, Buffalo, New York, on or about April 2, 1969.

The original return herein was filed by the undersigned executors and they still are acting in that capacity.

*or such greater amount as may be legally refundable, with interest.

EXHIBIT B, ATTACHED TO COMPLAINT

COMPUTATION OF INCOME TAX REFUND	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item I above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

THE NATIONAL BANK OF NORTHERN NEW YORK, Executor

Signed By Vice President

Dated March 31, 1970 Executor

SEE INSTRUCTIONS ON REVERSE

Form 843 (Rev. 11–68)

EXHIBIT B, ATTACHED TO COMPLAINT

STATEMENT

ATTACHED TO AND MADE A PART OF AMENDED CLAIM (Form 843) FOR REFUND OF ESTATE TAX BY RUTH K. CHILD AND THE NATIONAL BANK OF NORTHERN NEW YORK AS EXECUTORS OF ELIZABETH M. HAAS DECEASED DATED MARCH 31, 1970.

A prior Claim dated March 27, 1969 for a refund of $935,096.66 was filed on or about April 2, 1969. A report on the examination of that Claim transmitted to the executors under date of October 10, 1969 recommended disallowance of any refund and at the request of the executors an Appellate Division hearing has been held. Final action is pending.

The executors maintain and reassert their contention as set forth in the prior Claim that the specific bequest to Grove Cemetery and the entire residuary estate including the portion passing to Watertown Cemetery Association are exempt from estate tax. Since the amount of refund requested in the prior Claim was computed on the basis of that contention and the additional deductions hereinafter referred to are all pre-residuary deductions there is no change in the dollar amount of the requested refund as computed in this Amended Claim. However, the executors believe that the increased amounts of administration expense enumerated below should be allowed as separate deductions from the taxable estate.

1. The executors respectfully allege that the deduc-

tion of $252,150 previously allowed for estimated executors' commissions (Schedule J, item 1 of Return) should be increased to $297,326 and that latter sum should be allowed for such commissions as computed below in accordance with the applicable statute of New York State now in effect.

Pursuant to Surrogate's Court Procedure Act §2307 effective September 1, 1969 that computation is as follows:

Receiving Commission computed on the value of the Gross Estate at date of death as follows:

Gross Estate received by executors (Schedule O of Return)	$7,787,501
Less assets specifically bequeathed	3,189
	$7,784,312

Computation for receiving at <u>one-half</u> statutory rate:

$ 25,000 at 2%	$ 500
125,000 at 1 3/4%	2,187
150,000 at 1 1/2%	2,250
7,484,312 at 1%	74,843
Single Receiving Commission	$79,780

EXHIBIT B, ATTACHED TO COMPLAINT

Brought Forward - Single Receiving Commission		$ 79,780
Paying Out Commission on principal paid out (valued as of date of payment) and principal remaining on hand (at original inventory value) to be paid out hereafter:		
Paid Out to date	$5,825,709	
Remaining on hand	868,849	
	$6,694,558	
Computation for paying out at one-half statutory rate:		
$ 25,000 at 2%	$ 500	
125,000 at 1 3/4%	2,187	
150,000 at 1 1/2%	2,250	
6,394,558 at 1%	63,946	
Single Paying Out Commission		68,883
Total Single Commission		$148,663
Multiply for two executors		x 2
Total estimated commission on principal		$297,326
Amount previously allowed per Return		252,150
Additional deduction now claimed		$ 45,176

EXHIBIT B, ATTACHED TO COMPLAINT

2. Pursuant to §8-1.4 of the New York Estates Powers and Trusts Law, effective September 1, 1967, the estate is required to file with the Attorney General of the State an annual report of charitable trust and to pay to the State Department of Law a filing fee of $100 per year. For the years 1968, 1969 and 1970 the total of such fees is $300 which the executors respectfully allege should be allowed and deducted from the gross estate as a necessary expense of administration of the estate not previously claimed by them.

3. The executors respectfully allege that the deduction of $150,000 previously allowed from the gross estate for estimated attorneys fees (Schedule J, item 2 of Return) should be increased to $225,000. The services required of estate attorneys have far exceeded what reasonably could or should have been anticipated even in the administration of an estate of this substance. In addition to the customary and normal services of estate counsel, the extraordinary services in this instance have included (a) defense of a Will contest brought by decedent's only distributees, ultimately terminated by withdrawal of all objections to the Will upon a cash settlement advantageous to the estate, (b) representation of the estate in a proceeding in New York Supreme Court for a determination approving that settlement and authorizing the residuary beneficiaries church and cemetery to participate therein, (c) subsequent attention to objections by the Surrogate of Jefferson County to the

EXHIBIT B, ATTACHED TO COMPLAINT

Supreme Court approval with resultant delay in probate of the Will by the Surrogate for upwards of four months, (d) representation of the estate in proceedings brought in Surrogate's Court by attorneys for beneficiaries requesting approval of fee allowances to them involving numerous and protracted hearings before the Surrogate, a petition to and appearance before the Appellate Division of the State Supreme Court resulting in confirmation of the prior proceedings, obtaining dismissal by the State Court of Appeals of the Surrogate's attempt to appeal as of right to that Court and our subsequent and successful opposition to his motion for leave to appeal to the Court of Appeals, (e) preparation and presentation of initial claim for estate tax refund for $935,096 and of protest to proposed disallowance thereof, (f) attendance at conference with Appellate Conferee with respect to that claim, (g) preparation and presentation of this Amended Claim for refund, (h)extensive research, counsel and advice with respect to all of the foregoing.

In the event that any material part of the Claim for refund as hereby amended and supplemented is rejected, it is the intention of the executors to bring action for refund in Federal District Court. Extensive additional services will be required of the estate attorneys in the preparation, presentation and prosecution of that action.

The deduction of $150,000 previously allowed for

EXHIBIT B, ATTACHED TO COMPLAINT

attorneys fees is slightly more than one executor's commission as computed above and slightly less than a fee computed in accordance with the recommended fee schedule of the Jefferson County, New York, Bar Association for the customary and usual services required of an attorney for an estate of this size. In view of the additional and extraordinary services outlined above, the complexities and unusual problems encountered and the time and effort which will be necessary hereafter in the anticipated tax litigation, an allowance of $225,000 is justified and will not exceed a reasonable remuneration for legal services and disbursements.

4. Reference was made in paragraph 6 of the prior Claim filed on or about April 2, 1969 to proceedings then pending in Surrogate's Court of Jefferson County on separate applications by the several attorneys representing three beneficiary organizations under decedent's Will for payment of allowances to them from the estate pursuant to §2110 of the New York Surrogate's Court Procedure Act. Those proceedings in Surrogate's Court since have been dismissed by order of the Appellate Division of the New York Supreme Court "with leave to renew in Supreme Court, Onondaga". (See Order of the Appellate Division, Fourth Department, entered at Rochester, New York, on October 23, 1969). A motion by the Surrogate for permission to appeal that order to the State Court of Appeals has been dismissed. (See Order entered at Albany, New York, on February 26, 1970.) The

executors expect and believe that the applications for allowances in the same amounts now will be renewed in Supreme Court.

If as a result of those applications the Supreme Court makes an order allowing the requested total of $30,450 to the attorneys for the two residuary legatees and the other beneficiary organization involved as an expense of administration in aid of probate and properly payable out of the estate such amount should be allowed and deducted from the taxable estate.

5. The following is a summary statement of the amounts claimed as allowable deductions for Administration Expense in the original Claim for Refund and the additional amounts set forth above in this Amended Claim:

Original Claim			$ 1,088
Amended Claim:			
Executors' Commissions		$45,176	
New York State Statutory Filing Fees		300	
Attorneys' Fees			
Per para. 3 above	$75,000		
Per para. 4 above	30,450	105,450	
			150,926
Total such expense now claimed			$152,014

EXHIBIT B, ATTACHED TO COMPLAINT

6. The executors respectfully re-allege that the District Director of Internal Revenue erroneously disallowed their claimed deduction of the amounts bequeathed by Article EIGHTH of decedent's Will to Grove Cemetery Association and by Article TWENTY-FIRST of said Will to Watertown Cemetery Association and again request that said amounts be deducted from the taxable estate for the reasons set forth in the original Claim dated March 27, 1969.

7. A computation of the amount of refund claimed on the basis of the original Claim and this Amended Claim is attached hereto and made a part hereof.

8. The executors are informed and believe that there may be additional expenses of administration incurred hereafter by the estate or by the residuary beneficiaries which if paid at this time would be allowable as deductions from the taxable estate. The amount of the estate tax attributable to any such expenses is hereby claimed as a refund.

EXHIBIT B, ATTACHED TO COMPLAINT

HAAS ESTATE - COMPUTATION OF REFUND CLAIM

Based on prior Claim and this Amended Claim

GROSS ESTATE per Return Approved by District Director $6,228,111.04

Deductions per Schedule Indicated	Allowed by District Director	Additional Claimed	Total Claimed
"J" - Funeral & Administration	$ 434,759	$ 152,014	$ 586,773
"K" - Debts	57,818	2,000	59,818
	$ 492,577	$ 154,014	$ 646,591
"N" - Charitable Bequests	2,786,183	2,329,614	5,115,797
Total Deductions	$3,278,760	$2,483,628	$5,762,388
Statutory Exemption	60,000		60,000
TOTAL DEDUCTIONS & EXEMPTION	$3,338,760	$2,483,628	$5,822,388

TAXABLE ESTATE as Here Claimed $ 405,723.04

Tax on Same after State Credit $106,628.57

RECAPITULATION

Amounts Previously Paid by Claimants:

April 3, 1967 - Per Return	$ 106,644.33
July 28, 1967 - Deficiency Assessed	920,367.63
" " " - Interest	14,713.27
Total Payments	$1,041,725.23
Correct Amount of Tax Per Above	106,628.57
REFUND NOW CLAIMED	$ 935,096.66*

*Subject to adjustment for additional administration expenses when any such expenses have been paid by the executors.

ANSWER.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

----------x

RUTH K. CHILD and THE NATIONAL BANK :
OF NORTHERN NEW YORK, as Executors :
of the Last Will and Testament of :
ELIZABETH M. HAAS, Deceased, and :
WATERTOWN CEMETERY ASSOCIATION, :

Plaintiffs:

v. : Civil Action No. 70-CV-345

UNITED STATES OF AMERICA, :

A N S W E R

Defendant :

----------x

Comes now the defendant, United States of America, by its attorney, James M. Sullivan, United States Attorney for the Northern District of New York, and answers the plaintiffs' complaint as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Denies the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint, except the defendant avers that jurisdiction exists, if at all, pursuant to 28 U.S.C. Section 1346(a)(1).

ANSWER

5. Denies that the Watertown Cemetery Association is a plaintiff in this case.

6. Admits the allegations contained in paragraph 6 of the complaint.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Admits the allegations contained in paragraph 9 of the complaint, except the defendant denies each and every allegation of fact contained in the claim and amended claim for refund.

10. Admits the allegations contained in paragraph 10 of the complaint, except the defendant avers that the amount of disallowance was $913,085.73 and not $917,593.37.

11. Admits the allegations contained in paragraph 11 of the complaint.

12. Denies the allegations contained in paragraph 12 of the complaint.

13. Denies each and every allegation contained in the claim and amended claim for refund attached as Exhibit A and B to the complaint.

BEST COPY AVAILABLE

ANSWER

WHEREFORE, the defendant prays that the claim be dismissed and that judgment be entered for the defendant, together with costs.

United States Attorney

DEMAND FOR TRIAL BY JURY.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Answer has been made this _____ day of December, 1970, upon counsel for the plaintiffs by depositing a copy thereof, postage prepaid, in the United States mail addressed to: Scanlon, Willmott, Aylward & Wisner, 425 Washington Street, Watertown, New York 13301.

Stephen T. Lyons
Trial Attorney
Department of Justice
Washington, D.C. 20530.

STIPULATION OF FACTS.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW YORK, as Executors of the Last Will and Testament of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY ASSOCIATION, Plaintiffs	:	
v.	:	CIVIL ACTION NO. 70-CV-345
UNITED STATES OF AMERICA, Defendant	:	STIPULATION OF FACTS

The following facts are hereby stipulated among the parties to the above-entitled action, reserving to each party, however, the right to object to the admissibility in evidence of any such facts:

1. The plaintiff The National Bank of Northern New York is the surviving executor of the Will of Elizabeth M. Haas late of Watertown, New York, who died on January 15, 1966. Said Will was admitted to probate by the Surrogate's Court of Jefferson County, New York, on November 30, 1966. A certified copy thereof is attached as Exhibit P.

2. The plaintiff Ruth K. Child during her lifetime and at the commencement of this action was a co-executor of said Will and is now deceased.

STIPULATION OF FACTS

3. Said Will contained the following provisions:

EIGHTH: I give and bequeath to GROVE CEMETERY ASSOCIATION of LaFargeville, New York, the sum of Twenty-Five Thousand Dollars ($25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery.

TWENTY-FIRST: All the rest, residue and remainder of my property, real and personal of every name and nature, I give, devise and bequeath to THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF TRINITY CHURCH, Watertown, New York, and THE WATERTOWN CEMETERY Association, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used.

4. On April 3, 1967, the surviving plaintiff and the now deceased plaintiff as such executors filed with the Internal Revenue Service an Estate Tax Return in the estate of Elizabeth M. Haas and paid a tax thereon of $106,644.33.

5. On June 27, 1967, the Internal Revenue Service assessed against the estate an additional estate tax in the amount of $920,367.36 which was paid by the executors under protest with $14,713.27 interest on July 23, 1967.

STIPULATION OF FACTS

6. On April 2, 1969, the executors filed with Internal Revenue Service a Claim for Refund and on April 9, 1970, filed an Amended Claim for Refund of $935,096.66 of the estate tax and interest so paid.

7. During the month of June, 1970, the executors were advised that their Claim and Amended Claim had been disallowed to the extent of $917,593.37 and they then filed with Internal Revenue Service a waiver of statutory notice of such disallowance.

8. On or about August 21, 1970, the executors received from Internal Revenue Service a refund of $19,010.88 and interest of $3,487.58.

9. This action to recover the difference, namely $916,085.78, between the Claims for Refund and the amount of the refund actually made, with interest and costs, was commenced on or about September 28, 1970, by service of a complaint to which an answer on behalf of the defendant, United States, was served on December 4, 1970.

10. Watertown Cemetery Association and Grove Cemetery Association were incorporated pursuant to Chapter 133 of the New York Laws of 1847 entitled "An Act Authorizing the Incorporation of Rural Cemetery Associations"; at the time of Miss Haas' death, both associations were governed by the

STIPULATION OF FACTS

New York Membership Corporations Law (now Not-For-Profit Corporation Law).

11. (a) No part of the net earnings of either association inures to the benefit of any private stockholder or individual other than asan object of the purposes of the association.

(b) No substantial part of the activities of either association is carrying on propaganda, or otherwise attempting, to influence legislation.

(c) Neither association participates in, or intervenes in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

12. Grove Cemetery Association was incorporated on August 14, 1869, for the sole purpose specifically stated in its certificate of incorporation "of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead."

13. The sole activity of Grove Cemetery Association is the ownership, operation and maintenance as a cemetery of approximately five acres of land on the outskirts of LaFargeville, New York.

STIPULATION OF FACTS

14. The only revenues of Grove Cemetery Association are from the sale of burial plots, charges for the care and maintenance of burial plots, income from endowments and from funds set aside for maintenance purposes, gifts and bequests.

15. On and after January 15, 1966, the amount which Grove Cemetery Association would have required to establish a fund to provide for perpetual care of the Frederick Watterhahn Family plot in that cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years, was the sum of $2,000.00.

16. Watertown Cemetery Association was incorporated on September 1, 1853, for the sole purpose specifically stated in the Act under which it was incorporated "of procuring and holding lands to be used exclusively for a cemetery, or place for the burial of the dead." The corporate name was changed to Brookside Cemetery Association, Inc., effective January 1, 1973.

17. The sole activity of Watertown Cemetery Association is the ownership, operation and maintenance of a cemetery known as Brookside, approximately two miles from the city of Watertown, New York, comprised in all of approximately 162

acres of land. An aerial photograph of the cemetery and ground level photographs of various parts of the cemetery are attached as Exhibit Q.

18. Glenwood Cemetery owned by St. Patrick's Church of Watertown, a Roman Catholic church, is immediately east of Brookside and the burial ground owned by the Congregation Degel Israel of Watertown, a congregation of the Jewish faith, is immediately south of Brookside.

19. The only revenues of Watertown Cemetery Association are from the sale of burial plots, charges for the care and maintenance of burial plots, income from endowments and from funds set aside for maintenance purposes, gifts and bequests.

20. The Village of Watertown was established in 1820 by Chapter 166 of the New York Laws of that year and four years later the Village Trustees were authorized by Chapter 117 of New York Laws of 1824 to purchase and hold four acres of land for cemetery purposes.

21. In 1824 the inhabitants of the Village of Watertown voted to levy a tax of two hundred dollars for the purchase of land for a cemetery on what is now Arsenal Street adjacent to a pre-existing Roman Catholic cemetery; a public drawing was held to permit each Village taxpayer to receive one burial plot without charge; four plots, one for each

Protestant church then in the Village, were set aside for those churches without charge.

22. From its inception, the Arsenal Street Cemetery was maintained through the expenditure of Village tax monies and today, although no longer used for new burials, the Cemetery including the area of the old Roman Catholic cemetery and certain private burial lots, is maintained by the city of Watertown at public expense. Photographs of various parts of the cemetery are attached as Exhibit R.

23. Minutes and records of the Village of Watertown reflect attention by the Trustees to the requirements of operating and maintaining the public cemetery, including authorization of use of Village funds for cemetery expenses such as printing and issuing burial "scrips" attesting ownership of burial rights in particular plots, printing advertisements for the sale of plots, staking, fencing, removal of trees, purchase of a hearse and constructing a plank walk to the cemetery grounds.

24. The Village Sexton supervised the operation of the Cemetery; at the annual meeting of the Village held on April 7, 1851, the Sexton reported that since 1845 sixty-six and one-half burial lots had been sold at $2.00 each and the eight and one-half had not been paid for.

STIPULATION OF FACTS

25. In the early 1850's the Arsenal Street Cemetery was nearing its capacity and the Village Trustees recognized need for additional burial plots either by enlarging the existing cemetery or by acquiring a new site; a committee consisting of the President and three Village Trustees was appointed to investigate the alternatives and to make a recommendation; an option was obtained on August 24, 1853, to purchase land of one A.M. Rogers in the Town of Watertown.

26. The Village Trustees approved the Rogers land as the site for a new cemetery and called a Village meeting to be held on September 20, 1853, for the purpose of a vote by the electors whether the purchase should be made; the vote was to be by paper ballot and the polls were to be open from 10:00 a.m. to 3:00 p.m.

27. The Village option for the purchase of the Rogers land provided that if a cemetery association were formed and the Village decided not to make that purchase the association would have the right to do so.

28. The Village Trustees directed the Village Clerk to have printed and distributed to the dwelling houses in the Village one thousand copies of a letter by the Village President concerning the cemetery matter; the expense of printing and distributing the letter was paid for by the Village and it was printed in full in at least one Village newspaper.

STIPULATION OF FACTS

29. The Village Trustees selected the Rogers farm site and submitted it to the electors with a view, among other things, to acquiring enough land to meet the cemetery needs of the Village and for all future time.

30. The letter of the Village President to the electors of the Villag stated "if the (Cemetery) Association should finally determine to go on, the (Village) Trustees will most cheerfully abandon the project, as they do not desire to add to the burdens of the Village unless it becomes necessary."

31. At the Village meeting held on September 20, 1853, the Village Trustees certified that the electors had defeated the proposal to purchase the Rogers land; at a meeting held at 7:00 p.m. that same day the Association Trustees voted to purchase the property for a cemetery.

32. The acquisition of the property by the Watertown Cemetery Association was completed with the recording of the deed on July 31, 1854.

33. According to the diary of a Mr. Moses Eames, more than two thousand people attended the formal dedication of the cemetery on June 20, 1854; the program included a procession from the Village, music, scripture readings, speeches and a dedicatory address by The Reverend Mr. Chapin who was

brought from New York City for the occasion and was given an Honorarium of $50.00 plus expenses; the Cemetery Association with its funds provided carriages to transport the clergy and choirs of the various churches of the Village to the dedication ceremony.

34. Watertown Cemetery Association has performed the following acts, among others:

(a) In 1857 and 1858 the Trustees conveyed to the Volunteer Firemen of Watertown a section of lots at a reduced price; the area embellished by a large monument is still maintained by the Cemetery Association without reimbursement.

(b) In 1871, the Trustees undertook the rehabilitation of an adjacent older cemetery known as the Old Burrville Burying Ground; the area ultimately was deeded to Watertown Cemetery Association and still is maintained at the expense of the Association.

(c) In the 1870's and early 1880's the Trustees were concerned with obtaining extension of the public highways of the City and Town of Watertown to the cemetery. Ultimately the Association raised $9,144 by private contributions for construction of a public road from

the City to the cemetery which with some alteration through development of the State and County road systems is still in existence.

(d) In 1885 the Trustees dedicated without charge approximately 1,100 square feet of ground to the Henry Keep Home, a non-profit home for the elderly, for burial purposes.

(e) In 1872 the Trustees noted the desirability of providing a place for religious services within the cemetery and in 1882 the Trustees dedicated without charge a plot of land for the erection of a chapel.

(f) In 1870 a Committee of Trustees was appointed to confer with officials of the City of Watertown in regard to building a receiving vault for the remains of persons dying during the winter months; in later years the City maintained a public receiving vault adjacent to City Hall until both structures were demolished as a part of Urban Renewal in or about 1963; Watertown Cemetery Association since has permitted the use of the Chapel building in the cemetery for temporary winter storage of bodies by area cemeteries and funeral directors and keeps the access road plowed and open at all times.

STIPULATION OF FACTS

35. The Legislature by Chapter 90 of the New York Laws of 1857 authorized the Cemetery Association to sell not more than fifteen acres in order to pay pre-existing debts; eleven acres were sold to Mary A. Sherman and approximately three and one-half acres were sold to A.M. Rogers for this purpose.

36. In 1882 Watertown Cemetery Association established a perpetual care fund, payments to which were held in trust with the income only used for maintenance of lots and preservation of monuments; plot owners making payments to such fund were relieved from further annual assessments.

37. Amounts paid into the perpetual care fund for particular plots in prior years do not now produce sufficient income to pay the cost of present day care of those plots.

38. There are 497 plots in Brookside Cemetery for which no perpetual care payments were ever made; of these, the owners of only 30 plots are presently paying annual assessments.

39. The Jefferson County Commissioner of Social Services pays for the burial of persons dying without funds. The amount paid by the Commissioner for the burial plot includes the cemetery's charge for perpetual care.

STIPULATION OF FACTS

40. All cemetery plots for which no perpetual care payment was ever made and for which annual assessments are not being paid, receive the same care and maintenance as the remaining plots in the cemetery for which provision has been made.

41. The Legislature of the State of New York has declared that "The people of the state have a vital interest in the establishment, maintenance and preservation of burial grounds and the operation of the corporations which own and manage the same." (Chap. 533, Laws of 1949, Sec. 1).

42. Watertown Cemetery Association and Grove Cemetery Association, with regard to their cemeteries, and municipalities and religious organizations, with regard to their cemeteries, perform the same general function of providing and maintaining a place for the burial of the dead.

43. The following exhibits are authentic and are attached to this Stipulation and marked as follows:

(a) Minutes of meeting of the Board of Trustees of Watertown Cemetery Association held on the following dates:

1. September 1, 1853
2. September 12, 1853
3. September 14, 1853

STIPULATION OF FACTS

4. September 20, 1853

5. May 11, 1854

6. May 20, 1854

7. May 27, 1854

8. June 17, 1854

9. February 14, 1856

10. February 27, 1857

11. March 6, 1857

12. May 5, 1857

13. July 13, 1857

14. March 27, 1858

15. March 26, 1860

16. March 7, 1868

17. May 13, 1870

18. October 11, 1870

19. January 30, 1871

20. April 18, 1871

21. April 26, 1871

22. October 16, 1871

23. March 29, 1872

24. November 2, 1872

25. May 27, 1873

26. October 21, 1878

27. July 14, 1880

STIPULATION OF FACTS

28. Undated, probably May, 1881

29. June 8, 1881

30. June 21, 1881

31. April 22, 1882

32. May 6, 1882

33. September 25, 1882

34. April 12, 1884

35. May 14, 1885

36. June 8, 1895

37. October 7, 1913

38. May 19, 1925

39. August 30, 1938

(b) Articles of Incorporation of Watertown Cemetery Association;

(c) Program for Dedication of Cemetery on June 20, 1854;

(d) Report of Mr. Hanford, dated May 5, 1882;

(e) 1895 Pamphlet;

(f) Letter to Lot Owners dated October 3, 1923;

(g) Letter to Lot Owners dated March 20, 1925;

STIPULATION OF FACTS

(h) Letter to Lot Owners dated May 27, 1926;

(i) Letter to Finance Committee dated October 12, 1927;

(j) Minutes of meetings of the Trustees of the Village of Watertown held on the following dates:

1. October 20, 1823
2. October 27, 1823
3. May 3, 1824
4. September 26, 1825
5. December 6, 1825
6. May , 1826
7. March 30, 1838
8. April 3, 1848
9. September 18, 1848
10. January 22, 1849
11. April 7, 1851
12. June 16, 1851
13. March 21, 1853
14. August 1, 1853
15. August 29, 1853
16. September 5, 1853

STIPULATION OF FACTS

17. September 12, 1853

18. September 20, 1853

19. March 6, 1854

20. May 11, 1854

(k) Option agreement dated August 24, 1853;

(l) Letter from Village President to the Electors of the Village, September, 1853;

(m) Notice of Election to be held September 20, 1853;

(n) Plaintiffs' answer to Interrogatories;

(o) Articles of incorporation of Grove Cemetery Association;

(p) Certified copy of decedent's last Will;

(q) Aerial photographs of the Brookside Cemetery and ground level photographs of various parts of the cemetery;

(r) Photographs of various parts of the Arsenal Street Cemetery.

44. Internal Revenue Service granted to Watertown Cemetery Association on December 29, 1941, a certificate of exemption from Federal income tax under what is now Section 501(c)(13) of the 1954 Code, which exemption is still in effect.

STIPULATION OF FACTS

45. The issue in this case is whether the bequests to the Grove Cemetery Association and the endowment fund of the Watertown Cemetery Association are deductible from the decedent's gross estate under Section 2055(a)(2) or Section 2055(a)(3) of the Internal Revenue Code of 1954.

IN WITNESS WHEREOF this Stipulation has been signed by the Plaintiffs The National Bank of Northern New York surviving executor of the Last Will and Testament of Elizabeth M. Haas, deceased, and the Watertown Cemetery Association (now Brookside Cemetery Association, Inc.) and by the defendant United States of America by their respective authorized representatives and with the approval of their respective attorneys appearing herein.

Dated: July 11, 1974.

The National Bank of Northern New York, surviving executor of the estate of Elizabeth M. Haas, deceased.

By _____
Trust Officer

STIPULATION OF FACTS

Watertown Cemetery Association
(now Brookside Cemetery
Association, Inc.)

By David C. Knowlton
President

United States of America

By Stephen Tetzlaff

Approved:

Henry H. Willmott
Henry H. Willmott, Attorney
for The National Bank of
Northern New York as Executor

Lawrence Conboy
Lawrence Conboy, Attorney
for Watertown Cemetery
Association

Stephen Tetzlaff
Attorney for United States
of America

TRANSCRIPT OF TRIAL TESTIMONY.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

RUTH K. CHILD and NATIONAL BANK OF NORTHERN NEW YORK, ETC.

Plaintiffs,

-against-

UNITED STATES OF AMERICA

Defendant.

Civil No. 70-CV-345

The following proceedings took place on the 20th day of August 1974, at the United States District Court, Federal Building, Auburn, New York, before HONORABLE EDMUND PORT, United States District Judge.

APPEARANCES:

HENRY H. WILMOTT, ESQ.
JOHN V. AYLWARD, ESQ.
Attorneys for Plaintiff Executors
425 Washington Street
Watertown, New York

LAWRENCE CONBOY, ESQ.
Attorney for Cemetery Association
Watertown, New York

JAMES M. SULLIVAN, JR.
United States Attorney
STEVE LYONS
Trial Attorney
Department of Justice
Washington, D. C.

TRANSCRIPT OF TRIAL TESTIMONY

THE CLERK: RUTH K. CHILD and NATIONAL BANK OF NORTHERN NEW YORK, ETC. against UNITED STATES OF AMERICA.

MR. WILMOTT: Ready.

MR. LYONS: Ready.

THE COURT: I got the file from the clerk. I find proposed findings of fact from the plaintiff and defendant; I find the stipulation of facts; I find a memorandum of law from the plaintiffs but I don't find any from the Government, has one been submitted?

MR. LYONS: No, it has not, your Honor

THE COURT: That answers my question. I couldn't find it. Why didn't you file one?

MR. LYONS: Your Honor, at the time there was filed, approximately a year or so ago, it was anticipated we would file one soon thereafter. What happened was continuances for one reason or another held the trial up and the trial had not been set down, and we did not feel that at this particular time it would be appropriate for the court, with the rather extensive stipulation of facts that we had, to submit a brief until all the facts had been submitted to the court. So at this particular time, what our intention is,

immediately after the trial is over, to sit down and file a brief.

As I understand it the plaintiffs are pretty much going to rely on their initial brief and they will reply to our brief.

THE COURT: I will give the plaintiffs an opportunity to reply to the Government's brief.

MR. LYONS: Thank you very much.

THE COURT: Of course I have got something less than a full view when I start the case.

MR. LYONS: I realize that, your Honor.

THE COURT: All right.

Now do I understand correctly that we are to have one relatively short witness and the rest is on stipulated facts and the depositions?

MR. WILMOTT: That is correct, sir. We intend, today, with Your Honor's permission, to hand up to the court the exhibits that are stipulated in the stipulation of facts and which we have here. I might say parenthetically they are largely photo-copies of old records, and we have the original minute books here if necessary, and we have tried to type them up in more readable form.

THE COURT: Let me ask the counsel this, have the typewritten - we will refer to them as transcripts, for lack of a better word - of the

original hand[illegible] records been examined by the defendant?

MR. LYONS: They have, Your Honor, and I believe -

THE COURT: And you are satisfied as to the accuracy?

MR. LYONS: I believe we are, Your Honor.

THE COURT: All right.

MR. WILMOTT: We also, as your Honor mentions, intend to take the testimony this morning of one witness, and it will indeed be brief as far as we are concerned.

We had hoped to have a second witness, also brief, this morning. I might identify him as the City Manager of Watertown. Tuesday morning turns out to be the Town Meeting morning in Watertown, and a couple of crises apparently arose in city government and short of subpoenaing him there was no way in which Mr. Forbes was going to be able to come this morning, and we abided by his wishes and did not subpoena him. He felt that his duties in Watertown were more important.

We have brought with us a letter by Mr. Forbes addressed to myself as attorney for the plaintiffs which we have just shown to Mr. Lyons this minute. He has not had proper opportunity to see it.

TRANSCRIPT OF TRIAL TESTIMONY

We had hoped, perhaps, we might work out some stipulation with Mr. Lyons as to the contents of that letter, what, Mr. Forbes, the City Manager, might testify to if he was here. Mr. Lyons has indicated he may have some objections, which I respect. If so we would only have to ask to arrange for his testimony to be taken at a later date. It would be very brief in any event.

THE COURT: Well, I can accomodate you on that score. It is a non-jury trial, nobody has been pushing for the trial, I can't say that anybody has broken their backs to get to trial. I heard talk that everyone was ready a year ago. The case was on the calendar and then I find that depositions are being taken last week and the rush was on tyo have them typed in time for the trial today.

I assume that that is a deposition of one of them that you are referring to?

MR. WILMOTT: We have the original depositions as sent to us from Cincinnati.

THE COURT: All right, we will work out something on the City Manager, and I can understand Mr. Lyons' position, it is rather difficult to cross-examine a letter.

All right.

MR. LYONS: Especially a letter that has in it, even if the man was here to testify, some heresay anyhow.

THE COURT: I can well imagine if he is talking about what occurred a hundred years ago he was not a witness to the occurrence.

MR. WILMOTT: We also had in mind, Your Honor, you have already touched on this, working out a definite briefing schedule at this point so perhaps now there will be some pressure to get the matter submitted finally, and we have these long months -

THE COURT: I have news for you, you may be pressured but I won't.

MR. WILMOTT: Sir, I did not mean that, believe me, but I mean pressure on ourselves.

THE COURT: All right.

MR. WILMOTT: Finally, we had hoped, with Your Honor's permission, that we might be allowed from the plaintiffs' side to present a brief oral statement this morning in clarification of the issues as we see it.

THE COURT: An opening statement?

MR. WILMOTT: An opening statement.

THE COURT: All right.

MR. WILMOTT: Whether we could do this now -

THE COURT: Yes, I will hear you now and give the Government an opportunity to open as well.

MR. WILMOTT: The Court please, by way of identification, Iam Henry H. Wilmott, my partner is John V. Aylward and we represent the remaining executor, the National Bank of Northern New York. The other executor named in the title of the action, Ruth K. Child, has died since the action was commenced.

On my left is Lawrence Conboy, attorney for the Watertown Cemetery Association, the co-plaintiff. Parenthetically, the Watertown Cemetery Association, now by change of name is Brookside Cemetery. If I use the words interchangeably I mean the same organization.

The action is brought for refund of some dollars, $16,000.00 of estate taxes claimed by the plaintiffs to have been erroneously assessed against the estate of one Elizabeth M. Haas and paid under protest by the executors.

The plaintiffs, as we have noted, are the executors of the estate, joined by the Watertown Cemetery Association, which is one of two residuary beneficiaries under the will of the late Miss Haas -

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THE COURT: May I interrupt for just a minute?

MR. WILMOTT: Certainly.

THE COURT: Now what is the value of the residuary legacy to the cemetery? I am talking now about the Watertown, the main residuary legatee?

MR. WILMOTT: Subject to correction -

THE COURT: Approximately.

MR. WILMOTT: I am going to say one and a half million dollars.

MR. LYONS: Your Honor, it is about two and a half million dollars.

THE COURT: You are talking after you deducted -

MR. LYONS: That is after the taxes, it would be about a million and a half.

THE COURT: That is, assuming you don't get a refund?

MR. WILMOTT: That's right.

THE COURT: They have a million and a half in their hands. Now they would have substantially two and a half?

MR. WILMOTT: That's correct. The sections of the Internal Revenue Code involved are 2055A2 and 2055A3, and the issue as we see it can be rather

simply stated, whether or not the bequests here involved , whether by the residuary or by specific bequests exempts them from the estate tax because of the religious and/or charitable nature of these two organizations.

We contend that these bequests are and should be exempt, whether they be deemed outright, in which event they would presumably come under subsection A2 of 2055, or in trust, in which event they would then come under subsection A3 of 2055.

We contend that the bequests are in nature charitable and religious, charitable not in the limited sense of relief of the poor or alms giving, but in the sense of providing for the common good, the general welfare, meeting a public need, and in the last analysis lessening the burden of Government, in that without these cemeteries it would seem apparent that government would have to provide some other method and place of disposal of bodies.

We also contend that a cemetery has a religious function. These cemeteries are not directly connected with churches, they are not controlled by churches, they are not adjacent to churches, but they do in our eyes fulfill an ancient duty recognized by religions generally

of providing for decent and reverent disposal of human bodies after death, and to that end we will present to the Court this morning the deposition of the witness Milton Garb taken last week in Cincinnati.

As Your Honor has already correctly pointed out, the basic facts have been agreed to and have been stipulated by counsel, and Your Honor has, I believe, the original signed stipulations of fact.

In that stipulation reference is made to various exhibits which we will hand up here to the court, and again I would simply point out that we have transcribed these from official records which we could produce, if necessary, but the Government has not put us to that task.

We have also the deposition of Dr. Garb.

Both these cemeteries are old, well established. Both were incorporated under Chapter 133 of the Laws of 1847 of the State of New York, Watertown Cemetery, Inc. in 1853 and Grove Cemetery in 1869.

Their corporate purposes as set forth in the act of incorporation, or in the charter, are limited to procuring and holding lands to be used exclusively for cemetery or a place of burial

of the dead. Neither cemetery has any other business. Neither has any shareholders. No dividends or profits are paid to any individual or organization.

WE note that since at least 1895 cemeteries in the State of New York have been rigidly regulated by statute. The current statute found in the not-for-profit corporations law was at the time of Miss Haas's death in 1966 found in the Membership Corporation Law. In either event the statute is detailed, specific, and rather lengthy, prescribing very definitely what a cemetery may do, how a cemetery may handle its funds, for what purposes cemetery funds may be spent.

In adding an amendment to this same law in 1949, the state legislature in its wisdomadded a preamble stating that the people of the state have a vital interest in the establishment, maintenance and preservation of burial grounds, and they noted further a public policy of the State of New York that to protect the well being of citizens and to promote public welfare, cemeteries shall be conducted for the mutual benefit of lot owners and not for private individuals.

We contend that -

THE COURT: May I interrupt for just a minute here. Your opening is taking on the aspect of a combined opening and summary, and I have no objection to it at all, I find it helpful, but now when you talk about charitable and religious, aren't you going to be obliged to take one or the other? That is, if it is saving a municipality from the expense of a function which it would otherwise have to undertake, certainly it couldn't undertake a religious function. So that insofar as the municipality is concerned, don't you have to separate yourself from the religious, and if you maintain religious, then you would have to separate yourself from the municipal function, the charitable, in the light that you put it?

MR. WILMOTT: The main thrust of our argument would come back to the charitable, in that again we conceive of the cemeteries as lessening the burden of government, and if I use that phrase too frequently, I think that in time it will be apparent why.

THE COURT: Because it isn't solely because it lessens the burden? I suppose these fellows that collect rubbish lessen the burden on municipalities and taxpayers, but I don't think there would ever be any claim that they are a charitable organization, regardless of what

they did with the money.

MR. WILMOTT: I think perhaps the answer to that, Your Honor, would be that the individuals collecting rubbish are in it for profit.

THE COURT: No, I am assuming they are not, they are just fellows that are aesthetically devoted to aesthetics, not liking to see cans around the street.

MR. WILMOTT: Well, it may be somewhat difficult to stand here and see how far one might stretch the concept. We are relying heavily on the case of Dulles against Johnson, decided in the Second Circuit Court of Appeals, with which Your Honor perhaps is familiar.

THE COURT: I am not. I notice you cite it here in your brief, though.

MR. WILMOTT: Yes, and if I may digress, I did not know that I probably should get into legal discussion -

THE COURT: You probably should, but it is helpful to orient me.

MR. WILMOTT: The case of Dulles against Johnson, decided in 1959 and cited as 273, Federal Reporter 2d, page 362, and certiorari denied by the United States Supreme Court, involved the

estate of Nelson Cromwell, a wealthy lawyer in New York, who by his will left -

THE COURT: The fellow that gave all the money to the Bar Association?

MR. WILMOTT: Exactly, and it was that gift, those gifts that were in issue in this case. He gave money to the Bar of the city, county, and State of New York, and the Circuit Court of Appeals ruled and wrote its rather interesting and detailed decision to the effect that the bar associations in controlling the unauthorized practice of law, in controlling its membership in the matter of client grievances, and providing functions like law libraries and similar facilities was doing something that absent those bar associations, the Government would have to do, and that thereby the gifts by Nelson Cromwell to the bar associations were providing something in lieu of governmental expense and lessening the burden of Government, and for that reason those bequests were ruled to be charitable. That is the main thrust of our argument. We do feel, however, that there is a religious function served by the cemeteries, and we do feel also that there may be an overlapping here somewhat in that any one of us can remember

institutions of good that we think of as charitable today, to-wit, a hospital, a childrens' home. So many of these were started in the first instance by religious organizations, and as we have gone on they have become secular, but they still have retained the charitable nature that they had in their founding when they were founded by religious bodies.

I don't mean that they are exclusive, one to the other, it is only in relation to the municipalities that I raise the question.

If I may speak briefly, the Watertown Cemetery Association, the organization that quite obviously has the largest stock in this law suit, we feel and urge that the evidence which is here in the stipulations and the records show that the Watertown Cemetery Association in fact is successor to an old public burial ground which was first established by the Village of Watertown in 1825. Watertown as a village was chartered by the legislature in 1920, and early on in its days the trustees recognized the needs for burial facilities for its inhabitants and petitioned the legislature for an enabling act which the

1870

legislature passed in 1924 or 1925 authorizing the freeholders and inhabitants of the City of Watertown to levy a tax to the tune of $200.00 and expend that money to buy four acres of land. This they did on Arsenal Street in Watertown, as it was then and still is, we will refer to it as the old Arsenal Street Burying Ground. Lots were laid out and the minutes of the trustees of the 1820's show that each taxpayer was allowed one lot. A drawing was held for the best lots, and the lots were conveyed, as we understand, without charter.

THE COURT: I suppose those in the shade are the best?

MR. WILMOTT: Four lots, according to the minutes, four lots were set aside, one each for the four Protestant bodies. The Protestant church was then - why no Roman Catholics? It so happens according to the old records and maps that the Roman Catholic had greater foresight and had bought their own piece of property immediately adjacent to the public cemetery. In the ensuing years the subject of the cemetery is a repeated item of business before the trustees,

in fact as I read them over I can't help but feeling that the support of the volunteer fire department and its buckets and ladders and the support of the cemetery were the most time consuming matters the community dealt with. There are resolutions levying taxes and raising money to stake out and survey the cemetery, to lay out the lots, to build a fence, to build a walk, if you please, from downtown section, all done at village and public expense. However, as would be expected in a growing community, the land began to run out and as they reached the 1850's the burial lots were becoming few and far between and they approached the limits of the boundaries of the cemetery.

The then mayor and city council seeing the need, appointed a committee of several members to make a study of the burial problem and what to do, whether to try to buy additional land immediately adjacent to the existing cemetery, or to start out afresh with a new lot.

THE COURT: Is this where they held the referendum?

MR. WILMOTT: That's right.

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THE COURT: Now, in outlining the facts I think it might be helpful to you and to me as well if you keep in mind that I have just read your brief this morning. I don't say that I have readh it with any degree of thoroughness, but if you will allude to the facts sufficiently to refresh my recollection I think it would be equally as helpful as detailing them.

MR. WILMOTT: The trustees obtained an option on a farm, decided to put the matter, as Your Honor points out, to referendum. The mayor of the village wrote a letter which was distributed to the freeholders and inhabitants in which interestingly enough he again alludes to the burden of government. We find this a very strange and interesting fact, that in 1853 this seemed to be on the minds of the village trustees. The letter is included in the book.

At the same time the Watertown Cemetery Association was in the process of organization, and the mayor advised the people that if they voted down the village cemetery, it was his understanding that the private cemetery association would go forward.

TRANSCRIPT OF TRIAL TESTIMONY

THE COURT: This is the least expensive way, I would expect it would be -

MR. WILMOTT: They voted down the public cemetery.

THE COURT: No taxes.

MR. WILLMOT: That same day the Board of Directors, Board of Trustees of the newly incorporated cemetery voted to accept the option and bought the land that the village had recommended.

From there on we find a continuing interest in the cemetery in public affairs and vice versa. I will not detail those, they are in the stipulation as to how over the years the Watertown Association through its interest in providing burial spots at reduced rates for voluntary firemen and free burial plots for old residents of the old ladies home, etc. In any event since those early times Brookfield Cemetery in our view, has stood as the successor of the public cemetery and has provided the place which otherwise the village would have had to provide and now the city would have had to provide.

The Arsenal Street Cemetery remains. There are pictures of it. It is maintained by the taxpayers through a city budget. There have been no burials in it in many years. It continues as a public property. The grave sites are full, there

could be no more burials there. It was along this line that we had intended to ask the city manager to appear here as a witness this morning.

Very briefly then in conclusion, with reference to the financing of a cemetery as set forth in the not-for-profit corporation law to which I have alluded, a perpetual care fund is provided and a percentage of the purchase price of each lot is set aside in the perpetual care fund, the theory being obviously that that fund will generate enough income to continually have the grass mowed, the flowers trimmed etc. Actually Brookside Cemetery had a perpetual care fund back as far as 1882, and the records will show, and it is so stipulated, that there are four hundred ninety-seven burial plots in Brookside Cemetery for which no contribution was ever made into the perpetual care fund. Furthermore -

THE COURT: That is, no contribution was made and no part of the purchase price was allocated?

MR. WILMOTT: That's correct. Furthermore, in more recent years the charge made for the perpetual care was in keeping with the value of the dollar and

has been as low as $50.00, I believe, lower than that at one time. In any event my point is that in this day and age of inflation and the cost of mowing the grass, there are at least four hundred and ninety some that have generated no income, lots that have generated no income for upkeep. There are others who in terms of the time when payment was made it was reasonable but is no longer so, and this is stipulated. The same care is given to all grave sites, to every part of the cemetery, regardless of financial contribution, and in a sense then it is the generosity and payment of others who are taking care of those who did not in a financial manner contribute.

THE COURT: Of course I would say that I don't think that it has any bearing on the legal questions involved, but I would say that Brookside is never going to be in danger again, no matter what happens, that is, as far as perpetual care is concerned.

MR. WILMOTT: I think that is obvious in terms of the amount of which we are talking.

MR. LYONS: They may have too much.

MR. WILMOTT: That I doubt.

THE COURT: I didn't hear the remark, I can't comment.

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MR. WILMOTT: One word in conclusion. With respect to the religious matter, and I perhaps have touched on it in answering Your Honor's questions, but that we see in the cemetery's dedication to the providing of a reverent and decent place for burial a religious purpose which indeed we think supports the charitable function as well, that the two do go hand in hand.

THE COURT: Now I suppose there are no restrictions on burials in Brookside, that is, an atheist could be buried there, couldn't he?

MR. WILMOTT: Absolutely.

THE COURT: Now would that be considered religious or would it be the antithesis of religion?

MR. WILMOTT: May I say first of all in light of Your Honor's question that I hope it is crystal clear that Brookside refuses no burial for any man, regardless of face, religious persuasion, or otherwise. It is so that an atheist may be buried there, presumably without benefit of clergy in the customary manner, so that we still say that it is one's duty for proper and reverent burial to repose the remains of whomever it is whether they wish prayers over their grave or not.

THE COURT: That is, you can equate the burial of an atheist with a religious duty?

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MR. WILMOTT: Yes sir. I might also say that it occurs to us that if Brookside refused to bury -

THE COURT: That is a civilzed -

MR. WILMOTT: Custom, tradition.

THE COURT: And gesture, performance of a civilized duty.

MR. WILMOTT: That's right. We also would suggest that if Brookside did refuse, and it does not, but if it did refuse to bury an atheist and all other cemeteries did likewise, we are back again to the duty of the public andthe Public Health Laws.

THE COURT: We would get into charity.

MR. WILMOTT: We are prepared at any time to discuss the law at some length and the cases Mr. Lyons cited.

THE COURT: I think it would be better if you did that at length after you know what the Government's contentions are, what their cases are. They have the benefit of your memorandum.

MR. WILMOTT: I am going to ask at this time permission for Mr. Aylward to take over and conduct the examination of the witness.

MR. LYONS: Your Honor, may it please the court, I assumed the Government was going to get equal time?

MR. WILMOTT: I beg your pardon.

THE COURT: You will.

MR. WILMOTT: Would you prefer to proceed with the case?

THE COURT: No, I would like to hear your opening so as I hear the witnesses -

MR. WILMOTT: I didn't intentionally mean to cut off my friend, I apologize.

THE COURT: I am sure you didn't.

All right Mr. Lyons.

MR. LYONS: Your Honor, I will be very brief, and I don't believe the address of my remarks will have anything to do whatsoever with the gentleman's testimony today. I quite frankly don't know what it would have to do withthe issues in this case, but I suppose it probably has some connection.

First of all I would like to go back a moment and say this, I don't think there is going to be too much question in regard to the basic facts in this case. I think the Court can tell from its rather voluminous stipulations that we submitted that everything is pretty well agreed to in this case.

As far as the contentions of the plaintiff regarding the differentiation as to whether or not

the bequests are in trust or is directed to an organization, I don't think the Government is going to make much of an issue of that because I don't think it makes any difference in the facts of the case. I don't mean to say that we are going to concede the point at this present time, but my thinking right now is that I don't believe that the outcome of this case would depend on that distinction.

THE COURT: That is, whether it is an outright bequest or -

MR. LYONS: Or whether it is in trust, I just don't realistically see it in the facts of this case.

THE COURT: It is your position it won't change, it is a charitable or religious bequest?

MR. LYONS: Yes, it is our contention that it is neither.

THE COURT: But that fact won't make it one or won't prevent it from being one?

MR. LYONS: I don't think it meets the legal issue we have in this case one way or the other.

THE COURT: All right

MR. LYONS: Obviously as I said, Your Honor, our contention is that under either section of the Code that Mr. Wilmott mentioned, namely Section 2055A2

and 2055A3, that we don't believe that this organization is operated exclusively for charitable or religious purposes.

Our basic contention that it is not charitable is based on the legislative history of the predecessors of what I will refer to as Section 2055A2, as well as every single case, Your Honor, that has been decided under those particular Code sections, even the one case that I have been able to find that was decided adverse to the Government is clearly distinguishable, as we will point out in our brief.

The most recent case, Your Honor, in this area, which dealt directly with bequests to cemeteries associations and their deductibility as either charitable or religious organizations, is the Bank of Carthage against United States, 304 Fed. Supp. 77, a 1969 case, which although it doesn't analyze completely the prior cases, it does analyze very clearly the problems in this area and it ultimately along with the other courts reaches the same conclusion, that such a bequest does not fall within the ambit of Section 2055A2.

THE COURT: What circuit is that?

MR. LYONS: That is in the Eighth Circuit, Your Honor.

TRANSCRIPT OF TRIAL TESTIMONY

THE COURT: Did that deal with statutes, state statutes similar to the statutes pointed out by counsel here?

MR. LYONS: Your Honor, to answer your question directly here, I cannot recall. I think it did not. I think that it dealt solely with the Federal question that we have before the Court here.

I would like to digress for just a moment and say this. It is our belief that the statutes in that case certainly do not control, and that it doesn't deal with cemetery associations as "charitable institutions", and only relates to the rule against perpetuities and for no other reason. We do admit, however, what they do say, namely, that as Mr. Wilmott pointed out that they are limited in certain ways etc. My recollection of Bank of Carthage case is that it deals solely with the Federal question that we have before us, and I don't believe that no matter what the state law says, that the Court must decide based on what the Federal question is in this case, namely, whether or not it is charitable or religious within the meaning of the statutes.

Certainly no state could determine whether or not this particular organization is charitable or religious within the meaning of the Federal

statute. I believe the Court would certainly agree with that.

As far as the case which they primarily or solely rely on, Dulles against Johnson, I think at this point in time it is sufficient to say it does not deal with a bequest to a cemetery association as all the cases which we have found in the brief and which we will cite to the Court.

I don't believe we have cited any cases that do not deal with specific facts of this case, namely, a bequest to a cemetery association itself.

I might add by way of comment, Your Honor, that in the Bank of Carthage Case it was an organization, was esempt from income taxes, but which the Court found still that the bequest was not deductible within the meaning of charitable or religious.

Your Honor, there may be a problem that this one witness may address himself to, and that is this. On the complaint there is printed a party, the Watertown Cemetery Association, it is in addition to the estate. Now as far as the Government is concerned, that particular person is not a proper party. We admit that probably ultimately the amount of money that would be refunded, if any,

would ultimately end up in the hands of the Watertown Cemetery Association, that the only check the Government could ever write would be to the person who allegedly overpaid the taxes, namely the estate, and for that reason we -

THE COURT: Well, that is ultimately the case in every estate tax, isn't it?

MR. LYONS: I suppose it really is.

THE COURT: It falls on the beneficiary, neither a residuary or a specific beneficiary, a specific legacy or bequest.

MR. LYONS: I suspect, Your Honor, part of the testimony this gentleman would give today, would be regarding the fact that some of the taxes or all of the taxes with respect to this particular case came out of their residuary part. I would like to apprise the Court that as far as the Government is concerned any such testimony really doesn't bear on whether or not these bequests are either charitable or religious.

THE COURT: I don't suppose it is being offered for that purpose, I suppose it is on the question of real party in interest, if there is any such question. The statute permits the one that files the refund to bring the action.

MR. LYONS: That is the only party that is permitted.

THE COURT: That is my general notion.

MR. LYONS: That is correct. With that, Your Honor, I believe the Government is finished with its opening.

THE COURT: All right, I will hear your witness.

MR. WILMOTT: I would like to point out that Mr. Conboy is the interested attorney in the matter of the real party in interest, if that is what you would call him. Perhaps he would like to be heard.

THE COURT: Is that what the testimony is directed to?

MR. WILMOTT: In part.

THE COURT: All right, I will hear you, Mr. Conboy.

MR. CONBOY: Very briefly, sir, Rule 17 of the Federal Rules of Civil Procedure deal with the question of real party in interest, who may bring an action, and among other things Subdivision A, it is stated and I paraphrase because I don't recall the exact language, it says that an executor and/or other representative but specifically an executor may bring an action for the recovery of funds in his name as executor without joining with

him the party out of whose pocket the money has come. Obviously I am paraphrasing, but what I mean to say is the word "may" is indicative he may be joined if he wishes, and that is our position that we are properly a party.

THE COURT: I suppose if you are not properly a party, your remedy is to hold him to his duty as a fiduciary if he doesn't fulfill it.

MR. LYONS: Your Honor, one of the problems that this is going to raise in the eventuality whether they win or lose is the proper payment of attorney's fees, that would be deductible in any event, and our contention is that basically his attorney's fees are not deductible because he is not a party in interest within what we understand the jurisdiction.

THE COURT: That is for another court at another time, isn't it?

MR. LYONS: That is my whole point, I don't think it has any bearing in this law suit. It will have a bearing on the law suit, because it will determine the amount, we are going to have to admit they are entitled to some additional attorney's fees in this case, win or lose.

THE COURT: You don't have to if the Court holds against the residual legatee here.

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MR. LYONS: Well, we say that you would hold against the estate rather than the residual legatee.

THE COURT: No, what I am talking about is dismiss as not a proper party.

MR. LYONS: I see.

THE COURT: The Government hasn't consented to suit, I assume is the argument?

MR. LYONS: That's right, because of the jurisdictional requirements of the Code, United States Code.

THE COURT: All right.

MR. AYLWARD: If Your Honor please, I would like to first offer the deposition of Mr. Milton Garb. It was taken -

MR. LYONS: Your Honor, we did note an objection on the record.

MR. AYLWARD: Could we have it marked first?

MR. LYONS: Fine, go ahead (A document marked plaintiffs' Exhibit 1 for identification).

MR. AYLWARD: Perhaps at the same time we may mark as Exhibit 1A what was plaintiffs' Exhibit 1 at that deposition, which is incorporated and is a part of it (Document marked plaintiffs' Exhibit 1A for identification).

THE COURT: Now that is an exhibit, is it?

MR. LYONS: To the deposition.

MR. AYLWARD: It is an exhibit to the deposition and it is incorporated as well.

THE COURT: All right, mark it 1A.

MR. AYLWARD: At this time, if Your Honor please, I offer Exhibit 1 and 1A, the deposition of Dr. Garb.

MR. LYONS: We note an objection on the record in the deposition. I would like to reiterate the objection. The deposition is solely a hypothetical question with the underlying reason for that hypothetical question, the hypothetical question is basically was this organization a religious - did it perform a religious function.

THE COURT: That's just great, I don't have anything to decide.

MR. LYONS: That is exactly my point, that this totally invades the province of the Court, that it is totally inappropriate for the Court to even consider such a piece of testimony, because it does totally invade the legal province of this Court.

THE COURT: Obviously I haven't seen the deposition or the exhibit, and it would be wise at least for me to hold this while I examine it now. I will reserve my ruling and rule on it with my decision. Your objection is noted.

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MR. LYONS: Very well, Your Honor.

MR. AYLWARD: My point in offering it is not to usurp Your Honor's decision, because it is really a historical question. Dr. Garb is a religious historian and we offer this as some evidence for Your Honor's consideration.

THE COURT: All right.

D A V I D C. K N O W L T O N

called as a witness in behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AYLWARD:

Q You are David C. Knowlton, are you not?

A I am.

Q How old are you?

A 64.

Q Where do you live?

A In Watertown, New York.

Q And what is your occupation?

A I am a paper manufacturer, I am Chairman of the Board of Knowlton Brothers.

Q What is Knowlton Brothers engaged in?

A. Manufacturer of special papers.

Q And how large a corporation is that?

A By definition how do you mean, in sales?

Q Well, in sales.

A Our annual sales volume is in the neighborhood of $16,000,000. We have four locations of manufacturing paper.

Q And are they located in different states of the United States?

A Located in four different states.

Q And as chairman are you the active manager of that corporation?

A No, the president of the corporation is the active manager.

Q How active are you in that corporation?

A Daily attendance to responsibilities, but not directly connected with daily operation.

Q Where were you born?

A Detroit, Michigan.

Q Did there come a time when you moved to Watertown, New York?

A In December 1931.

Q And do you live in the City of Watertown now?

A I do.

Q Have you resided there continuously since 1931?

A I have.

Q Now in addition to your duties as chairman of Knowlton Brothers Paper Company do you perform other

community service?

A I do.

MR. LYONS: I object to the form of the question, community service, whatever he does he does.

THE COURT: Well, it may stand.

MR. AYLWARD:

Q Are you connected with Brookside Cemetery?

A I am.

Q And what role do you play in Brookside Cemetery?

A I am a member of the Board of Trustees and president of the Board of Trustees.

Q And how long have you been a member of Brookside Cemetery's Board?

A Since 1954.

Q How many men make up the Board of Trustees of Brookside Cemetery?

A At present eight men, there is, however, one vacancy on the Board.

Q Who are the other members of the Board?

A Do you wish them by name?

Q Yes.

A The vice-president is Leon W. Quick Jr. - do you wish any more names?

Q What is his occupation?

A Automobile dealer in Watertown.

Q Would you name the others and their occupations?

A John R. Wilmott, who is a retired insurance executive;

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Robert G. Hoar Jr., who is a vice-president of the Community Savings Bank; W. Graham Wright, who is a lumber dealer, wholesale lumber dealer; Ray Robinson, who is a stationer and retail bookstore owner and operator; Paul Westfall Brown, a practicing attorney; William W. Condi, a retail appliance merchant - may I refresh my memory?

Q Yes, you may.

A I think that is the total makeup of the Board at the present time plus one vacancy.

Q As members of the Board of Trustees of Brookside Cemetery Corporation, what do you do?

A We meet quarterly to conduct the affairs of the cemetery. We are responsible for the operations of the cemetery through the staff. We are responsible for the investments and management of income and disbursements.

Q Do you or any members of the Board of Trustees receive any pay or compensation for that work?

A No.

Q Are there any shareholders to Brookside Cemetery Corporation?

A No.

THE COURT: Isn't all this stipulated?

MR. LYONS: It is, Your Honor.

THE COURT: All right.

MR. AYLWARD: Basically, your Honor.

BY MR. AYLWARD:

Q Would you tell us, Mr. Knowlton, whether or not all of the funds of the Brookside Cemetery Corporation are used for cemetery purposes exclusively?

A The income from our funds are used exclusively for operation and maintenance of the cemetery.

Q Does your cemetery corporation have any other purpose other than that of burying the dead?

A No.

MR. LYONS: Objection, Your Honor, that term "burying the dead", I don't even know what it means myself. There are so many different things that burying of the dead can be associated with.

THE COURT: I will let it stand. I think it is obvious that you do other things besides conduct burials, you take care of the grounds, you mow the grass, make plantings.

THE WITNESS: That's correct.

THE COURT: O.K.

MR. LYONS: Your Honor, I understand -

THE COURT: I think this is all stipulated anyhow..

MR. LYONS: Just to clarify the record, it is my understanding that they do not themselves conduct the burials.

TRANSCRIPT OF TRIAL TESTIMONY

THE COURT: You may cross examine.

MR. LYONS: O.K.

THE COURT: What the witness said.

BY MR. AYLWARD:

Q I will ask that very question, Mr. Knowlton, who actually lowers the body into the grave?

A The members of the staff of the cemetery, the groundskeeping staff.

Q Who digs the hole in which the casket is placed?

A The members of the groundskeeping staff.

Q And who fills in the hole after the casket is lowered?

A The members of the groundskeeping staff.

Q And those are employees of Brookside Cemetery, are they not?

A They are.

THE COURT: Is there any union arrangement about who does those jobs?

THE WITNESS: No sir.

MR. AYLWARD: If Your Honor, please, as one of the stipulated exhibits there is this aerial photograph, I think referred to as"R".

MR. WILMOTT: "Q".

THE COURT: If you have stipulated all your exhibits, why don't you put them all in.

MR. LYONS: Your Honor, to my knowledge they are in evidence at the present time.

THE COURT: In connection with what?

MR. LYONS: Well, I think that the procedure that we followed was that we had submitted the stipulations of facts, together withthe exhibits to the court with the understanding that they could be used for any purpose.

THE COURT: Are those part of the stipulations?

MR. LYONS: Yes they are.

THE COURT: All right, all exhibits that were offered in connection with the stipulated facts are received for the record so that there will be no question about it. You can refer to the markings they carry in connection with the stipulated facts.

BY MR. AYLWARD:

Q I show you, Mr. Knowlton, Exhibit Q, do you recognize what that is?

A I do.

Q What it is?

A It is an aerial photograph outside of the City of Watertown which includes the property of Brookside Cemetery Association.

Q And is Exhibit Q an aerial photograph?

A It is.

TRANSCRIPT OF TRIAL TESTIMONY

Q And does it show in addition to Brookside Cemetery, lands adjacent to the cemetery proper?

A It does.

Q Will you point out Mr. Knowlton on Exhibit Q the area which is owned and used by Brookside Cemetery?

A Roughly within this boundary, and a small portion in here with a right of way (indicating).

THE COURT: That doesn't do anything for the record.

BY MR. AYLWARD:

Q Would you outline in this - may I go over to the table?

THE COURT: Yes, I would suggest you put your markings outside the roads which you have indicated are your boundaries.

THE WITNESS: Yes sir.

THE COURT: So that the markings now will be outside the actual boundaries and the roadways indicated in the photo are the boundaries, is that correct?

MR. AYLWARD: Yes. (Witness marks Exhibit Q)

THE WITNESS: This is approximate.

BY MR. AYLWARD:

Q Basically you have marked on this Exhibit Q the area in red as being the property of Brookside Cemetery, have you not?

A I have.

Q Does there also appear on this exhibit other cemeteries adjacent to the property of Brookside Cemetery?

A There do.

Q And will you point them out as you sit in the witness chair?

A This is the property approximately of Glenwood Cemetery. I do not know the exact boundaries of it, and this is the property of Degel Israel Cemetery.

Q Is the Glenwood Cemetery a religious cemetery?

A I believe it is.

MR. LYONS: Objection, Your Honor, there has been no foundation laid as to whether this gentleman knows whether or not what the function is that this cemetery performs.

THE COURT: Well, it is a cemetery in any event?

THE WITNESS: It is.

THE COURT: All right.

BY MR. AYLWARD:

Q Do you know who owns it Mr. Knowlton?

A It is under the aegis of the Roman Catholic Church of Watertown, but which church I do not know.

THE COURT: All right.

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BY MR. AYLWARD:

Q And the other cemetery, Degel Israel?

A Degel Israel Congregation, I believe.

MR. AYLWARD: I would like to have those two marked in a different colored pen.

THE WITNESS: I am uncertain as to the extent of it.

THE COURT: That is the approximate boundaries in green of what cemetery?

MR. AYLWARD: Glenwood Cemetery.

THE WITNESS: To the best of my recollection and knowledge.

THE COURT: You have indicated that it is operated by the Catholic churches in Watertown?

THE WITNESS: It is, sir.

THE COURT: All right.

BY MR. AYLWARD:

Q And may we likewise mark in green the other cemetery?

A And the smaller outline in green is the cemetery of the Jewish congregation, the Degel Isreal Congregation, I believe.

THE COURT: All right.

BY MR. AYLWARD:

Q Can you tell us, Mr. Knowlton, approximately how many burials are there per year at Brookside Cemetery?

A There are approximately one hundred burials per year over the period of the last four years. The

current year is proceeding at approximately the same rate.

Q Do you know where the Arsenal Street Cemetery is?

A I do.

Q Generally, where is it located?

A On the south side of Arsenal Street west of the viaduct over the Penn Central tracks.

Q And is Arsenal Street also known as State Highway Route 3?

A I believe so.

Q Who operates the Arsenal Street Cemetery?

A I believe it is under the ownership and maintenance and operation of the City of Watertown.

Q Does the City of Watertown, the municipality, to your knowledge, have any other cemetery inside the city or in the immediate environs of the City of Watertown?

A The City of Watertown to my knowledge owns no other cemetery.

Q To your knowledge, Mr. Knowlton, did the City of Watertown maintain a storage vault for bodies?

MR. LYONS: Objection, Your honor, there has been no foundation for that question whatsoever.

THE COURT: I thought I saw that in a stipulation some place, didn't I?

MR. LYONS: To the extent it is in the

stipulation, I would object to it as being repetitious.

THE COURT: I am uncertain as to what I saw in the stipulation or the statement of facts in the brief, I haven't got them segregated sufficiently in my mind.

MR. LYONS: Quite frankly, I am not sure either, but at any rate I don't believe this gentleman can be qualified to render such testimony.

THE COURT: My recollection is that it was there long before, long before this man came to Watertown.

MR. LYONS: I think what they are trying to do is obviate the necessity of bringing the City Manager in.

THE COURT: There is no harm in that.

MR. LYONS: Provided this gentleman is qualified to testify.

BY MR. AYLWARD:

Q I will rephrase it. Since 1931 when you came to Watertown, do you know whether or not the City of Watertown maintained a vault for storage of bodies?

A Will you repeat the question please? Since 1931?

Q Since you have lived in the city.

A Yes. (Reporter read back the last question of the above)

THE WITNESS: Yes, I do.

BY MR. AYLWARD:

Q Where was it located?

A It was located adjacent to the old city hall on Court Street.

Q Within your knowledge did there come a time when that vault was demolished by the City of Watertown.

A Yes.

Q Approximately when was that done?

A Approximately 1964 or 1965.

Q Since 1964 or 1965 has the City of Watertown operated a vault for the storage of bodies?

A Not to my knowledge.

Q Where have the undertakers taken bodies in the winter time?

A Brookside Cemetery has provided the service to the community during the winter months of storage of bodies for interment in its own and other cemeteries.

Q Prior to the time that the city demolished the winter vault, did Brookside Cemetery maintain a vault for those bodies which were to be buried in Brookside?

A Yes.

Q Prior to the time that the city demolished its winter vault, did you maintain for the benefit of other cemeteries a storage vault?

A As far as I know we did not. There may have been periods when the city vaults were filled and we

had, but I have no knowledge of it.

Q Do you now maintain that winter vault for the benefit of undertakers outside the City of Watertown?

A We do.

Q And is there any other facility in Watertown that you know of?

A Not that I know of.

Q That maintains bodies during the winter time?

A Not that I know of.

Q Is that a service you render to the various undertakers?and

A Yes.

Q Mr. Knowlton, is there an agreement between Trinity Church and Brookside Cemetery with reference to the refund of, if any, of the tax refund which is being claimed in this proceeding?

MR. LYONS: Objection, Your Honor.

THE COURT: Sustained.

BY MR AYLWARD:

Q Mr. Knowlton, has Trinity Church agreed with Brookside Cemetery that the tax refund, if any, as a result of this proceeding, will belong to Brookside Cemetery?

MR. LYONS: Objection.

THE COURT: Sustained.

BY MR. AYLWARD:

Q Do you have with you the agreement that exists between

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TRANSCRIPT OF TRIAL TESTIMONY

Brookside Cemetery -

THE COURT: Why do you persist in this, I have already ruled, haven't I?

MR. AYLWARD: You have, Your Honor, I wanted to mark it for identification.

THE COURT: All right.. Mark it for identification.

BY MR. AYLWARD:

Q Do you have with you that agreement which we refer to?

A I do. (A document marked Plaintiffs' Exhibit 2 for identification).

MR.AYLWARD: If Your Honor, please, we have had the agreement referred to marked as Exhibit 2 for identification. At this time I would like to offer Exhibit 2.

MR. LYONS: We of course object.

THE COURT: May I see it? (Document handed to Court)

THE COURT: Sustained.

MR. AYLWARD: We have nothing further of this witness, Your Honor.

CROSS EXAMINATION

BY MR. LYONS:

Q Mr. Knowlton, isn't it a fact that your cemetery association has absolutely nothing at all to do with any grave side services that may be performed prior

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to lowering the body into the ground?

A No, I don't think so.

Q Does your cemetery furnish perhaps a priest or member of the clergy to perform services at the grave side?

A No

Q They are in no way related, your organization, rather, is in no way related to the services, the actual religious ceremony, if you will, that is performed at the grave site, are they?

A I think it is an integral part of it.

Q Mr. Knowlton, perhaps you did not understand my question, my question is this, isn't it a fact that Brookside Cemetery does not provide any religious member whatever to perform services of the burial of a dead !erspm?

A That's correct.

Q O.K. And isn't it a fact that any services that may be held for that particular dead person outside of the grave side, it is also unrelated to the activities that your cemetery association performs?

A Would you repeat your question so that I understand it?

THE COURT: I think you might communicate with the witness a little easier if you were to stand.

MR. LYONS: Very well, Your Honor, perhaps I ought to stand closer.

BY MR. LYONS:

Q I take it, Mr. Knowlton, you have a hearing problem.

A Yes, I do, and this room is terrible. I am sorry.

Q All right, let me ask you this, prior to the time in which a casket is brought to the Brookside Cemetery, I take it that on occasion there could be a memorial service or religious service held somewhere else, isnn't that correct?

A That's correct.

Q And the Brookside Cemetery has absolutely nothing to do at all with that religious ceremony, do they?

A Not those that are held elsewhere.

Q That's correct and they also do not provide any of the clerics, if you will, for the grave side ceremony?

A That's correct.

Q So that the first time in which Brookside Cemetery has anything at all to do with a dead person is at the time that that person is lowered into the ground, isn't that a fact, except for the sale of the land.

A The preparation of the grave site.

Q O.K.

A And the arrangement for the service to be held at the grave site.

Q Anything else in the way of mechanical things?

A And the preparation of the casket for lowering and the actual lowering of the casket following the service.

Q ~~Anything else?~~

A The filling in of the grave.

Q Anything else?

A The maintenance of the site, the replacing to its original condition, the setting of the headstone and the related operations?

Q So then prior to the arrival of the casket at the grave site the only thing that the cemetery has done is to have dug a hole and prepare it for the reception of the casket, is that right?

THE COURT: I think I understand what the cemetery association does, they dig the grave. they fill in the grave, they provide the lowering device and they man the lowering device?

THE WITNESS: That's correct.

THE COURT: The prayers, the religious ceremonies in connection with the burial otherwise are performed by clergymen or someone other than the association, is that right?

THE WITNESS: Yes, but I think it is difficult to separate the functions.

THE COURT: That is what you are treating as part of the religious ceremony, is the lowering of the body?

THE WITNESS: I do.

THE COURT: Those workmen that man the straps or the winches or the cogs, whatever it is, are participating in your view in the religious ceremony.

THE WITNESS: Definitely.

MR. LYONS: I have no further questions, Your Honor.

THE COURT: Now in connection with this maintenance of the city vault, does the city make any charge for the storage of the bodies to the undertakers, do you know?

THE WITNESS: I do not know sir.

THE COURT: Does your cemetery?

THE WITNESS: Yes, we make a nominal charge to cover the cost of storing, plowing, getting them, handling them.

THE COURT: And now do you have an actual vault of some nature that is constructed for that purpose, or are the bodies stored in a chapel of sorts?

THE WITNESS: It is a building that was originally given as a chapel, it has a basement and it has a main floor, both of which are used for the storage of bodies.

THE COURT: I see.

MR. LYONS: Nothing further.

MR. AYLWARD: Nothing further.

(Witness excused)

MR. WILMOTT: Your Honor, please, the stipulation of facts I believe you have in front of you on page 3, paragraph 1A, B and C

speaks in the present tense, to wit, no part of the net earnings of either association inures to the benefit of any private stockholder or individual. I would ask if counsel for the Government would stipulate to amending that phraseology to the effect that at the death of Elizabeth M. Haas no part of the net earnings of either association inured to and no part of the net earnings now inures to, and the same with subissue BB and sub C, simply phrasing it in the past tense, referring to the date of death of the testatrix, as well as in the present tense.

THE COURT: That is, 11A, B and C apply, you wish the stipulation that those statements apply to the time of the death of the decedent and apply at all times thereafter?

MR. WILMOTT: Yes sir.

MR. LYONS: No objection, Your Honor.

THE COURT: All right, the stipulation of fact is so amended.

MR. WILMOTT: That includes anything we had expected to do today with the exception, as mentioned, we had intended to bring the City Manager of the City of Watertown. amd we would like, if we may, to preserve in some fashion an opportunity to have him sworn.

THE COURT: Well, we are all here, of course you know the problems that are involved in connection with assembling this court. We

have the court reporter who is one hundred and eighty miles away from the judge, the clerk is eighty miles from the judge, I suppose to put it their way the judge is one hundred and eighty miles from the reporter.

MR. LYONS: I might say that having read over what this gentleman testified to, perhaps the Court would like to read it over before it finally decides, it seems to me not to be very helpful or material to the court on the issue that is before the court here.

THE COURT: I am not going to decide that. I am not an advocate, I am a judge. Isn't there a line of cases that say that an advocate sees a great deal of things that a judge never does see?

MR. CONBOY: I think that within five minutes we can agree on something.

THE COURT: I think that perhaps that is better. We will take a recess now until 2:30, and if you gentlemen can dispose of this problem, fine. If you can't, I will be here and I will reconvene and we will get all the evidence before the court in some fashion.

Now what I have in mind is that I have tomorrow open, what about him? It is only an hour and a half drive, can he get down here? His testimony will probably be very short, can he get down here this afternoon? Mr. Lyons has a long way to go. His

meeting was this morning. I think Watertown would run -

MR. CONBOY: I have a feeling if we can have a short discussion with Mr. Lyons we can solve this problem.

THE COURT: All right, why don't you do that.

MR. LYONS: Your Honor, before the court recesses, perhaps we ought to take up the briefing schedule, because if we can resolve the problem I can get a 2:35 flight out of here.

THE COURT: I don't want to destroy your opportunity for that.

MR. LYONS: Well, it is just an extra four hours that I wouldn't care to wait around.

(Discussion held off the record)

MR. WILMOTT: In connection with the briefing schedule, we have submitted to Your Honor a trial brief which we propose to have Your Honor accept at this time as our brief of the law, with the understanding, of course, that upon receiving the Government's brief, we will have a reasonable opportunity to reply and perhaps supplement it slightly.

THE COURT: What about the transcript of the testimony, is that necessary for anybody's use?

MR. LYONS: As far as the Government is concerned it is not.

MR. AYLWARD: It is relatively brief, we could have it transcribed. I think perhaps we will order the transcript, I am sure Your Honor has sufficient notes that when you get to the problem perhaps -

MR. LYONS: Could we set the briefing schedule that we would have forty-five days after the receipt of the transcript to file our brief?

THE COURT: Do you need that much time?

MR. LYONS: How about thirty days?

THE COURT: All right, the Government has thirty days after the receipt of the transcript to file a memorandum in support of its position. The plaintiffs have two weeks to reply. With that the matter will be submitted to the court, be considered submitted, that is, assuming that you resolve your problems with the witness.

MR. LYONS: Otherwise we will reconvene at 2:30 this afternoon?

THE COURT: Otherwise I would like you back at 2:30. I have a pre-trial at 2 o'clock that I know will take at least a half hour.

(Thereupon the foregoing matter was concluded)

TRANSCRIPT OF TRIAL TESTIMONY

REPORTER'S CERTIFICATION

I, MARTIN L. MILLER, Official Court Reporter for the United States District Court in and for the Northern District of New York, do certify the foregoing to be a true and accurate transcription of the stenographic notes as taken by me during the aforesaid proceedings.

Martin L. Miller

Official Court Reporter
U. S. District Court
Northern District of New York

LETTER, DATED OCTOBER 29, 1974, HENRY H. WILLMOTT TO HON. EDMUND PORT.

October 29, 1974

Honorable Edmund Port
United States District Court
Federal Building
Auburn, New York 13021

Re: Ruth K. Child & The National Bank of Northern New York, as Executors of the Last Will and Testament of Elizabeth M. Haas, Deceased, and Watertown Cemetery Association vs. United States of America
70 CV 345

Dear Judge Port:

I enclose plaintiffs' Reply Brief. Copies are being mailed this date to the Department of Justice and to the United States Attorney.

In reviewing the stenographic transcript of the testimony taken before you at Auburn on August 20th, I have noted a number of typographical errors which in the interest of complete accuracy should be corrected as follows:

1. The name of plaintiffs' witness, Milton M. Gatch, is incorrectly spelled Garb on page 10 in two places and also on pages 32 and 34.

2. The year in which Watertown was chartered as a Village is given in the 4th line from the bottom of page 15 as 1920. The correct year was 1820.

3. The years 1924 and 1925 appearing in the first line at the top of page 16 should be 1824 and 1825 and the last word in the same paragraph should be change rather than charter.

We are in receipt of the defendant's brief and with the filing of the Reply which is enclosed herewith, we be-

LETTER, DATED OCTOBER 29, 1974, HENRY H. WILLMOTT TO HON. EDMUND PORT

lieve the matter now fully submitted for your consideration.

Respectfully yours,

HHW:KC
Enclosure

Henry H. Willmott

CC: Scott P. Crampton, Esq.,
Assistant Attorney General

James M. Sullivan, Esq.,
United States Attorney

Lawrence Conboy, Esq., (Natural course)
Attorney for Watertown Cemetery Association

PLAINTIFFS' EXHIBIT 1.

IN THE UNITED STATES DISTRICT COURT

OF THE NORTHERN DISTRICT

OF NEW YORK

- - -

Ruth K. Child and THE NATIONAL BANK OF NORTHERN NEW YORK, as executors of the last will and testament of ELIZABETH M. HAAS, deceased and Watertown Cemetery Association,	:	CIVIL ACTION NO. 70-CV-345
Plaintiff,	:	
vs.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

- - -

Deposition of DR. MILTON McCORMICK GATCH, a witness herein, taken by the plaintiff as upon direct examination pursuant to the Federal Rules of Civil Procedure and pursuant to agreement between counsel as to the time and place and stipulations hereinafter set forth, at the United States Post Office & Courthouse, Cincinnati, Ohio, at 11:00 a.m. on Monday, August 12, 1974, before Teresa Fischer, court reporter, the witness being duly sworn by John Aylward, Esq., a notary public within and for the State of New York.

PLAINTIFFS' EXHIBIT 1

APPEARANCES:

On behalf of the Plaintiff:

John Aylward, Esq.
425 Washington Street
Watertown, New York

Henry H. Willmott, Esq.
425 Washington Street
Watertown, New York

Lawrence Conboy, Esq.
407 Sherman Street
Watertown, New York

On behalf of the Defendant:

Stephen T. Lyons
Assistant United States Attorney
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

- - -

S T I P U L A T I O N S

It is stipulated by and among counsel for the respective parties that the deposition of DR. MILTON McCORMICK GATCH, a witness herein, may be taken at this time by the plaintiff, John Aylward, Esq., as upon direct examination, pursuant to the Federal Rules of Civil Procedure, and all other legal formalities being waived by agreement; that the deposition may be taken in stenotypy by the court reporter and transcribed by her out of the presence of the witness; that the notary public, John Aylward, Esq., may swear the witness; and that the submission of the transcribed deposition to the witness for his signature is expressly waived.

PLAINTIFFS' EXHIBIT 1

MR. LYONS: Let's just stipulate, first of all, that all of the objections that either party may make regarding the use of this deposition will be reserved until the time of the trial, except any objections as to the form of any questions asked by either side. And that this deposition is being taken persuant to agreement by the parties without any formal notice. And this deposition is being taken because the deponent will be out of the country during the time of the trial. 3

MR. AYLWARD: So stipulated.

MR. LYONS: Fine.

MR. AYLWARD: It is further stipulated that I may, as a notary public, may administer the oath to Dr. Gatch who is about to testify here, today.

DR. MILTON McCORMICK GATCH

of lawful age, a witness herein, being first duly sworn as hereinafter certified, was examined and deposed as follows:

DIRECT EXAMINATION

BY MR. AYLWARD:

Q State your name.

A Milton McCormick Gatch, Jr.

Q Where do you live?

A 206 East Ridgeley Road, Columbia, Missouri.

Q How old are you?

PLAINTIFFS' EXHIBIT 1

A. I'm 41.

Q. Tell us what your family consists of.

A. I'm married. We have three children, two daughters and a son.

Q. What is your occupation?

A. I am a professor, and for the rest of this month, Chairman of the Department of English at the University of Missouri in Columbia.

Q. Are you about to leave the United States?

A. I am.

Q. Where are you going?

A. I am going to Cambridge, England.

Q. What are you going to do there?

A. I'm going to be, for the next academic year, a Senior Fellow, National Endowment for the Humanities. I'm conducting research at the University of Cambridge on the relationship between the liturgy, or the text of Christian worship and Anglo-Saxon literature. I am an associate member of Clare, C-l-a-r-e, Hall, Graduate College of Cambridge.

Q. How long will you be at the University of Cambridge?

A. I will be there until sometime in July of 1975.

Q. When do you leave here to commence that journey?

A. We leave Cincinnati on Saturday of this week, and we sail from New York on Thursday, the 22nd.

PLAINTIFFS' EXHIBIT 1

Q Dr. Gatch, tell us about your schooling and educational background.

A I attended the public college preparatory high school, Walnut Hills, here in Cincinnati. I went from there to the Haverford College in Pennsylvania. I took the Bachelor's Degree with honors in English in 1953, then returned to Cincinnati and studied law at the university, here, for two years. 1955-57, I was in the United States Army. Thereafter, I attended the Episcopal Theological School in Cambridge, Massachusetts; took the Bachelor Divinity with honors in 1960. And from the Episcopal Theological School, I went to Yale University and took church history in the Graduate Department of Religious Studies; M.A. in 1960 and Ph.D. in 1963. And I suppose I might also add that I'm ordained in the Episcopal Church Deaconate in 1960 and the priesthood in '61, I believe.

Q What academic positions have you held?

A In 1963 and '4, I was at the Wooster, W-o-o-s-t-e-r, School in Danbury, Connecticut. I was acting Chaplain and Master in Latin. I went then, from 1964 through 1967, to Shimer, S-h-i-m-e-r, College in Mount Carroll, Illinois. I was, for the first two years, Chaplain and Member of the Humanities Faculty, Chairman of the Humanities Faculty. I went one year, 1967-8 to Northern Illinois University, DeKalb. I was Associate Professor of English and acting Director of Graduate Studies in 1968.

PLAINTIFFS' EXHIBIT 1

I've been at the University of Missouri in Columbia. In '68 to '72, I was Professor, Associate Professor in English. I have been a Professor since 1972, and I am Chairman of the Department of English, 1971 through 1974. 6

Q Have you received certain honors in your academic work?

A As I mentioned, I had the Muller History Prize from the Episcopal Theological School; Graduate Fellow Shimer from the Episcopal Church Foundation at Yale; and, of course, the greatest honor, Senior Fellow, from the National Endowment for the Humanities, in which I don't deserve to be.

Q Well, Doctor, have you written books and papers on the field of religious history?

A I might perhaps start by the doctoral thesis: "The Eschatology of the Anglo-Saxon Homilists," concerning death and the afterlife in my period. And with the intention of broadening on that theme, my first book, Death: Meaning and Mortality in Christian Thought and Contemporary Culture, published in 1969 by Seabury Press; and also a selection of the Religious Book Club in that year. My second book was entitled, Loyalties and Traditions: Man and His World in Old English Literature, a general study of the cultural background and the literal period of the period I specialize. And I recently completed a book entitled, Preaching and Theology in Anglo-Saxon England, which

PLAINTIFFS' EXHIBIT 1

is going to be published by the University of Toronto Press; and there are a number of articles, several based on the disseration. One I've got -- source of discovery is "Some Theological Reflections on Death from the Early Church through the Reformation," published in a collection of essays on the subject of death in 1969. A number of other things -- need I detail the whole list or say other articles and number of reviews? 7

Q. Doctor, are you a religious historian?

A. I am.

Q. And does your religious history go back to medieval times?

A. It does. My sum interest is in the liturgies of the early church, and it also took a good deal of work. I have some interest in American church history. I don't publish in that area.

Q. Doctor, this summer of 1974, did Mr. Willmott and Mr. Conboy visit with you concerning the preparation of a paper regarding the religious functions of cemeteries?

A. They did.

Q. And did you prepare such a paper for them?

A. I did.

Q. And what is the basis and background for the paper that you prepared?

A. It's based very largely on the research which lies

PLAINTIFFS' EXHIBIT 1

behind my book on death. I did, in addition, some further research, both in my own library before I left Columbia, and in the library of Columbia University. 8

Q Did you submit to Mr. Willmott and Mr. Conboy a written statement on the religious functions of cemeteries?

A I did.

Q Now, Doctor, based on your expertise as a religious historian, do you have an opinion as to whether a cemetery corporation, which engages in no activity other than providing and caring for a place for the burial of the dead, which receives revenue only from the sale of burial plots, fees for their care and maintenance, gifts and bequests and the income from endowments and funds set aside for maintenance purposes, which uses its revenues exclusively for its own cemetery purposes and does not pay any of its net earnings to any stockholder or person, perform a religious function and operate for a religious purpose?

A Yes, I do have an opinion.

Q What is your opinion?

MR. LYONS: We're going to interpose an objection based on the fact we don't feel that the opinion that would be rendered here is relevant and invades the province of the Court; and it would be rendering a legal opinion only the Court can reach. And we stated before we were just going to reserve that objection.

PLAINTIFFS' EXHIBIT 1

You may answer the question. 9

Q What is your opinion?

A It's affirmative that it does perform such a function.

Q State the facts and give your statement and reasons for adopting that opinion.

(Plaintiff's Exhibit No. 1, "A Statement on the Religious Functions of Cemeteries," was marked for Identification as Plaintiff's Exhibit No. 1.)

Q (Continued) Doctor, I'll show you what has been marked, today, as Plaintiff's Exhibit No. 1, and is that the statement on the religious functions of cemeteries that you have provided to plaintiff's counsel?

A It is.

Q And does there appear on page 12 of that exhibit your signature?

A It does. It's a copy -- xeroxed copy.

Q Xeroxed copy?

A Right.

Q And is dated?

A 31st of July, 1974.

Q Doctor, the previous question that I asked you was to state the basis for the opinion which you have rendered and is the basis of your opinion contained in this Plaintiff's Exhibit No. 1

PLAINTIFFS' EXHIBIT 1

commencing on page 1 in the last paragraph, "The decent and reverent burial of the dead has been accepted as a duty of Christians from the earliest times," and thereafter continued through page 12 to your signature? 10

A. Correct.

MR. AYLWARD: All right. Mr. Lyons, rather than ask the Doctor to read, if you please, we are offering the contents of Plaintiff's Exhibit No. 1 as his answer to the question for the basis of his opinion.

MR. LYONS: Of course the Judge will have to decide.

MR. AYLWARD: You don't object to the form of doing it.

MR. LYONS: The alternative would be to read verbatim. So to avoid any such reading, the form in which this is presented, we don't have any objections.

Q. Dr. Gatch, is the contents of Plaintiff's Exhibit No. 1 exclusively your research?

A. Yes, it is.

Q. Have you ever testified in Court before today?

A. No.

MR. AYLWARD: You may examine him.

CROSS-EXAMINATION

BY MR. LYONS:

PLAINTIFFS' EXHIBIT 1

Q First of all, Doctor, in your recitation of your qualifications, you mentioned the fact you had gone to law school. I assume you did not graduate? 11

A No, I didn't.

Q Doctor, I take it from the file you gave me, there has been some correspondence between yourself and the attorneys for the executor regarding your testimony, is that correct?

A There has.

Q And one such letter, dated 10, July, 1974, states: "What I said on the phone about present feelings on the merits of the religious issue, the necessary argument to meet the problem of exclusively religious functions of the cemetery corporation is summarized under two at the end of the enclosed paper." The enclosed paper is what is now Exhibit No. 1. "The argument is difficult and it is perhaps a more sophisticated one than the Court reasonably expected to adopt or comprehend in a brief hearing." This is part of a letter which you sent to Mr. Willmott, is that correct?

A It is.

Q Now, Doctor, in your Exhibit No. 1, Plaintiff's Exhibit No. 1, there seems to run through here a theme that the burial of the dead is a religious function, is you will, is that correct?

A It is.

PLAINTIFFS' EXHIBIT 1

Q And I take it that that is the crux of the opinion which you rendered for Mr. Aylward, is that correct? 12

A It is, yes. I think it would be more correct to say burial of the dead can be a religious function.

Q And this is?

A Given the circumstances as set forth in the question put to me by these gentlemen.

Q This is the substantial sum, the heart of your basis, you your conclusion, that this is the basis of the conclusion that you rendered, here, in your opinion, is that correct?

A Yes.

Q Okay. Now, Doctor, do you know of anyone in your field or any related fields which has reach an opposite conclusion from that reached today?

A I do not. And since this paper was written, I have spent time in the catalogs of the Haverford University, of the Haverford Community School and Yale University looking for further commentaries and I have not found any.

Q So there was nobody else either for or against the conclusion that you have reached, is that what you are saying? You are the only person that you know of that has reached that conclusion?

A I am the only person to whom the question has been put in this way.

PLAINTIFFS' EXHIBIT 1

MR. AYLWARD: In 1974. 13

MR. LYONS: I assume since he said he hasn't found any previously, no one presented it, to the best of his knowledge.

A. (Continued) To the best of my knowledge -- I'm sure somebody must have, somewhere, I've not been able to track it down.

Q. Now, Doctor, your opinion concludes that this cemetery corporation performs -- a cemetery -- in the hypothetical -- performs a religious function. I take it that this is not to intimate in any way whatsoever that this cemetery corporation is one that is organized and operated exclusively for religious purposes. Your opinion is only with the fact it does perform a religious function, is that correct?

A. That is correct.

Q. Okay. Doctor, have you ever heard of the Internal Revenue Code?

A. Yes. Haven't we all?

Q. We are all affected by what it says, I realize that, and I take it that you are familiar with the code provisions which we're dealing with in this case?

A. Only in the most general way, that there are exceptions in certain circumstances.

Q. Your opinion is not based in any way, shape or

PLAINTIFFS' EXHIBIT 1

form, the way in which Congress used the word religion? 14

A No. My opinion is an historical, scholarly judgment.

Q I see. You did no research at all in what Congress may have meant by the word religious, by the code provisions we're dealing with, today, is that correct?

A That's correct. I considered, one time, looking up the definition of the word religion in a legal dictionary.

Q Legal is no part of your opinion, here, today, is that correct --

A Yes.

Q -- in this particular paper? Now, if Congress or the Courts had made a determination that that word, religious, did not include cemetery associations, would it change your opinion reached here, today?

MR. AYLWARD: I object to the form of the question. You may answer to the question.

MR. LYONS: What objection -- to what form are you objecting to?

MR. AYLWARD: If.

MR. LYONS: As being speculative and if'y -- because the gentleman is an expert -- okay.

Let's go back again and I'll repeat, rephrase the question because you didn't like the form, although I

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don't think I can really rephrase it very well other than the way I phrased it originally. 15

Q If Congress or the Courts or both had determined that cemetery associations were not organized and operated exclusively for religious purposes, would it change your mind?

MR. AYLWARD: I object to the form of the question. You may answer.

A No. I am -- I would go working on what seems to me historically reasonable and sound definition fo the term religion.

Q So whether or not Congress or the Courts decided otherwise, your conclusion remains the same, is that correct?

A Yes.

Q Doctor, let me ask you another question I had previously asked you about the basis of your thesis, here, if you will, being the actual burial of the dead. And I assume that what you mean by the burial of the dead is actually the service and the placing in the ground of the particular dead bodies, is that correct?

A That is, yes.

MR. LYONS: I don't have any further questions.

REDIRECT EXAMINATION

BY MR. AYLWARD:

Q Dr. Gatch, in your paper, Exhibit No. 1 for

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identification, you refer to Augustine, is that Saint Augustine? 16

A It is.

Q What was his status in the religious world then?

A He was the Bishop of Hippo at the end of his life, which is in Africa. And he was then, and has been ever since, regarded as one of the greatest theological writers, one of the several Fathers of the church and the greatest of the Latin-writing Fathers.

Q He refers and uses the word Pietas. What is the meaning of that word?

A Pietas is P-i-e-t-a-s.

MR. LYONS: That's the Latin?

DR. GATCH: That's correct. And of course it's the word from which piety comes, quite a different meaning. But it means beautiful conduct toward the gods, one's parents or family. In this case, in this context in which he's using it, the obligation of seeing to the burial of the dead.

Q Does Saint Augustine, in his writings, Pietas refer to Christians?

A I think not and there were at the time of Augustine still many non-Christians in the Roman Empire. He himself was converted rather late -- sort of a distress to his mother. His father was not a Christian, and it's my recollection that he

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would see this as an obligation on Christians towards -- on the part of the Christians towards the dead, no matter what their religious beliefs.

MR. AYLWARD: I have nothing further.

(Signature waived.)
DR. MILTON McCORMICK GATCH

- - -

DEPOSITION CONCLUDED AT 12:50 P.M.

- - -

PLAINTIFFS' EXHIBIT 1-A.

A STATEMENT ON THE RELIGIOUS FUNCTIONS OF CEMETERIES

BY Milton McC. Gatch
Professor and Chairman,
Department of English,
The University of Missouri--Columbia

I have been asked by the attorneys for the Plaintiffs in Civil Action No. 70-CV-345 in the United States District Court for the Northern District of New York, entitled "Ruth K. Child and others v. United States of America," to give my opinion as an expert witness on the question -

> Does a cemetery corporation, which engages in no activity other than providing and caring for a place for the burial of the dead, which receives revenue only from the sale of burial plots, fees for their care and maintenance, gifts and bequests and the income from endowments and funds set aside for maintenance purposes, which uses its revenues exclusively for its own cemetery purposes and does not pay any of its net earnings to any stockholder or person, perform a religious function and operate for a religious purpose?

Attached hereto is a statement of my qualifications as an expert in the field of religious history and a list of books, articles and reviews which I have written. In my opinion, the answer to the question posed is in the affirmative, and my reasons for this conclusion are as follows.

The decent and reverent burial of the dead has been accepted as a duty of Christians from the earliest times. In the light of the conflict between Christianity and the general culture during the centuries before the Edict of Toleration of A.D. 313, which

recognized Christianity as a permitted religion in the Roman Empire and signaled the triumph of Christianity, a certain ambivalence can be detected in the statements of early Christian theologians on the subject; however, on the one hand, Christianity (as a by-product of its birth within Judaism, yet in contrast with the other religions of the ancient world) was radically worldly: it avoided such concepts as immortality of the soul in favor of the notion of the resurrection of the body (cf. I Corinthians xv), a doctrine based ultimately on the imagery of several Old Testament writings (e.g., Ezekiel xxxvii; Daniel xii.2-3); it held that the quality of one's life in the body determined whether he would, at the Last Judgment, be a member of the Kingdom, or of the "communion of saints." Such notions and terms, enshrined in Scripture and in the "Apostles'" and "Nicene" creeds, have remained familiar to all orthodox Christians throughout the ages, despite the fact that their content or interpretation has from time to time undergone some modification. As a result of this centrality of the accumulation of expressions and ideas which enhance the importance and value of the body, Christians may have tended to give the physical body rather greater honor when it came to its disposal after death than they would otherwise have done given their deeply felt conflict with Greco-Roman culture.

For, on the other hand, Christians in the early period radically eschewed worldliness and, whenever possible, presented themselves as opposed to the values of the prevailing culture of

the Greco-Roman world especially as those values were expressed in social customs and rites related to paganism. Hence, quite certainly, the adamant opposition of early Christians to theatrical spectacles. Hence, very probably, the adoption of interment or inhumation as opposed to cremation as the normative means of disposing of the bodies of the dead. No sustained argument was made that interment was practiced because of the doctrine of the resurrection of the body--a remarkable fact given the importance of the doctrine, and one which seems to certify that the practice of interment was conceived as emphasizing the difference between Christian and other members of the society, among whom cremation was the more prominent custom.'

At any rate, Christian cemeteries came into being very early. The most famous were the catacombs in Rome, and it was at such cemeteries as these that Christian worship came to be associated with Christian burial. The Roman persecution created the martyrs, who were instantly venerated as the heroes of the church. (Tertullian [d.ca. 225], the first important Christian theologian who wrote in Latin said "The blood of the martyrs is the seed of the church": their example inspires the kind of devotion which enables the church to persevere and draws others to it.) The burial places of Christian martyrs--notably the place of St. Peter's burial in Rome--thus naturally became places where Christians gathered for worship. This fact (and the later custom of assembling relics of the saints at places of worship) greatly influenced the association of places of worship with places of

burial and helped to establish the principle that the church should, as a matter of course, provide places of burial for its dead.

It remained for the theologians of the period after the Toleration in the early fourth century to work out a consistent statment of the church's view concerning the disposal of the bodies of the dead. For the churches of Western Europe in this, as in many other areas, one of the most influential statements was that of Augustine in a writing entitled De Cura pro Mortuis Gerenda ("On the concern which should be had for the dead"). It may be worthwhile to quote as some length a recent summary of Augustine's argument (F. van der Meer, Augustine the Bishop, trans. B. Battershaw and G. R. Lamb [New York, 1961], pp. 495-96), for it fairly reviews a very standard and widely accepted viewpoint:

> Our duty to honour the dead, (Augustine) says, is part of that pietas which even our ancestors, who had not the Christian faith, held in high esteem. Elsewhere he says that even a Christian may give expression to his grief and shed tears, but his sorrow 'should not last too long'. The honouring of the dead should follow the custom of the country, and Christ himself has shown this by his example, for he praised Mary because she prepared his burial and he suffered himself to be buried with all the ceremonies of his country, 'according to the custom of the Jews'. Even if the finest and most edifying funeral is more a comfort to the surviving than a help to the dead, it would still not be right to dispense with these solemnities or to be negligent in them, for our pietas would take offence at this, and rightly so. If we surround our mortal shell with reverence, then this derives from the universal feeling of mankind which prevents men from hating their own flesh. It is true enough that

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> Augustine did not look upon the concern for worthy funerals and graves as a spiritual work of mercy, but rather as a strict duty of pietas. It is also true that he may, on occasion, have grumbled about the ostentatious mausolea of the rich; for all that, however, his little book breathes a genuine reverence for the dead human body as the withered shell of the soul and the vessel of the Resurrection. He gives all the examples he can find in Holy Scriptures of this duty of reverence toward the dead, pointing out how Tobias buried the dead at night under difficulties, and also referring to the annointing of the Lord by Mary, and his being laid in the grave by the two counsellors on the evening of Good Friday

It is important to note here that pietas is basically a secular value--and a secular word--assimilated from the traditions of Rome in the period after the cessation of persecution. The word has a wide range of meanings: "dutiful conduct towards the gods, one's parents, relative, benefactors, country, etc., sense of duty" (C. T. Lewis and C. Short, A Latin Dictionary [Oxford,-1892; rpt. 1962]). As Augustine used it in De Cura, pietas is both a filial and a civic sense of duty; at the same time, it also creates an obligation for the Christian church and thereby becomes religious. There will be occasion to contend below that, after centuries as a distinctly Christian value, this pietas for the dead became once more a secular value to which the church continues to give its assent and support.

Throughout the Christian centuries (one might say, roughly, into the eighteenth or even the nineteenth century--although in many places, particularly in Europe, the custom persists) the church provided places of burial for her people. For most,

burial was in the churchyard; hence, for example, almost every country church in England is surrounded by graves. For the leaders of church and state, burial was within the church; hence, St. Paul's Cathedral and Westminster Abbey in London attact tourists as much as mausolea as for their function as places of worship. Such burials in close association with church buildings were not only part of that pietas which demanded "a genuine reverence for the dead human body" and associated with the belief that one ought to pray for the dead as members of the ongoing community of faith but also served as reminders to the living of their own mortality and of the fact that the quality of their lives would determine their larger destiny. The conventions of the sculpture and inscriptions which adorned such graves made this point explicit. Often elaborate tombs depicted the dead person commemorated in an idealized or perfected way or as a skeletal, decayed cadaver; sometimes tombs depicted both states, making points about mortality and continuity simultaneously.

We come now to the American situation. Here two factors come into the picture which help to explain why cemeteries are now generally corporate associations distinct from the church and why those which are non-profit, at least, continue to fulfill a religious function. The first factor has to do with the growth experience of America. Although in early New England, where church and government were very closely linked, there were town cemeteries just as there were town churches, in the west-

ward expansion (in which the role of New York state is extremely important) the conditions of growth and the fact that settlers brought with them many Christian denominations rather than a single form of Christianity often favored the establishment of family rather than town burial grounds. Frequently a prominent family's burial ground would become the town burial ground under the aegis of civic government; or a private, not-for-profit corporation would be established to provide this service to the community which had formerly been provided by the church or by the town and the church in concert. In other words, one factor which lies behind the history of the development of community burial grounds in America is the peculiarly American phenomenon of denominationalism or religious pluralism.

Reference to not-for-profit cemetery corporations brings us to a second factor: the rise of so-called "voluntary associations" to further causes which were in most instances rooted in the religious impulse but which, given the fact of denominationalism, no single church could hope singlehandedly to promote. Such voluntary associations might undertake work which was charitable (hospitals, orphanages, relief of the poor), religious (societies for the spread of the Gospel) or reformist (anti-slavery societies, the temperance movement, Sunday schools for the education of working children); all were conceived as religious in their basic inspiration, orientation, and methods. Recent historians of religion in nineteenth-century America (most notably Sydney E. Ahlstrom) consider them extremely important manifestations

of the religious life of the time.

I know of no history of American cemetery associations, but I am certain they are intimately connected with this extremely important phenomenon in American religious history. Thus, at the same time as a cemetery corporation may be a charitable institution in the sense that it provides a necessary facility at no expense to the general public or taxpayers, it may also be a religious institution in the sense that most charitable institutions derive historically from Christian or other religious institutions and that this kind of charitable institution provides for the fulfillment of the duty of pietas (to revert to Augustine's term) toward the dead which has been universally recognized by Christians but which--especially in the light of American denominationalism--the churches as institutions have not been able efficiently to provide.

In summary, two historical observations have been made. First, historically the church has believed that the burial of the dead is an act of pietas or charity which it should perform in behalf of its members and of their survivors. Second, in America, because of the phenomenon of denominationalism and because of the rise of non-denominational, "secular," corporations to provide such acts of charity as no single denomination could efficiently provide, voluntary organizations have in many places sprung up to provide places of burial for members of the

community regardless of their religious affiliation. (Perhaps it should be noted here that the expression "regardless of religious affiliation" has meant in practice Protestants and persons without church affiliation. Roman Catholics, Jews, and certain other religious or ethnic groups have generally insisted on providing separate burial grounds. Often, however, these cemeteries have been in close proximity to the general community cemetery.)

Thus far this statement has attempted to present an objective, albeit broad and necessary brief, historical statement concerning the provision of burial as a function of the Christian churches in Europe and in America. It is necessary now to turn to matters which are more argumentative or, at least, involve conclusion based on the historical facts outlined above. Two points need to be made.

1) The historical argument that burial is a service provided--at first by the churches and later, in America, by voluntary corporations--within a religious context supports strongly the argument that a not-for-profit cemetery corporations' purposes are "exclusively charitable." The disposal of the dead in settled communities is a service which must be provided by some sector of the society. Historically in Christian lands, this service has been provided by the Church. But in America for a number of reasons (of which denominationalism must be counted a major factor) the provision of this service often passed from the churches and/or the civil governments to

corporations which are clearly to be counted within the definition of charitable. When (as in cases of destitution) the state must provide burial, it often uses the facilities of such cemeteries at the public expense or provides "potter's fields."

2) The argument may be raised that--since general, not-for-profit cemeteries allow for the burial of non-Christians or persons without religious affiliation or (even) persons of explicitly anti-religious views--such corporations have passed beyond the boundaries of the legal definition of the word "religious," let alone "exclusively religious." But in these cases, the function of the not-for-profit cemetery corporation would be governmental, or charitable. If the non-Christian or athiest would not be accepted by the church for burial in its cemetery, then perforce the town would provide the place for burial.

Nevertheless, there are also senses of the word "religious" which may legitimately be applied to the burial of non-church people. One of these definitions is based on the observation that Americans have a "civil religion," which can be traced ultimately to the fusion of Puritan and the Enlightened strains of American thought in the Declaration of Independence, the Constitution, and the Bill of Rights. Its continuity can be documented in the public utterances of most of the Presidents from Washington through L. Johnson. Not doctrinal in any potentially divisive way, the civil religion assumes the existence of a general body of broadly religious belief among Americans. One student of this and related phenomena (W. Lloyd Warner) has been particularly successful in defining the nature of civil religion

by analyzing the piety and the ritual associated with the cemeteries of New England towns; and the present writer has in passing observed that similar phenomena are to be found in Britain. The civil religion, it can be argued with great cogency, has virtually univeral assent and is strongly connected with the rememberance of the nation's dead.

Another sense in which "religious" might be applied to agnostic or athiest burials takes us back to Augustine's notion of pietas. Just as Augustine quite clearly adopted a number of concepts from Roman civic pietas in stating a Christian position on the care which ought to be taken for the bodies of the dead, so (after centuries in which the Christian faith in one form or another commanded a very wide assent) ideas from the Christian tradition remain active and influential in what has been called a "post-Christian" culture. Among such ideas, one may count the notion that facilities for interment ought (almost as a matter of course) to be provided by the community as the normative means for disposal of dead bodies. It may be an innate (and perhaps also religious) human feeling that decent, reverent disposal ought to be provided for the dead (and for the comfort of their survivors). It is also a fact that our customs in this regard have been directly shaped by the religious beliefs and customs of our progenitors. In this sense, burial customs remain "religious" in a broad, but perfectly valid, definition of the term.

PLAINTIFFS' EXHIBIT 1-A

CONCLUSION

Based on the foregoing, it is my opinion that when a not-for-profit cemetery corporation as defined in the question posed at the beginning of this statement furnishes and maintains a place for interment of dead human bodies, it is performing a religious function or purpose.

Dated: 31st July 1974 William McC. Stokes

******

BIBLIOGRAPHICAL NOTE:

Other than as necessitated by a few direct quotations or other specific references, no documentation has been included above. The general argument is adapted from my own research for Death: Meaning and Mortality in Christian Thought and Contemporary Culture (New York: Sebury Press, 1969). On nineteenth-century American voluntary societies, see Sydney E. Ahlstrom, A Religious History of the American People (New Haven: Yale University Press, 1972), especially Chapter 39. The work of Warner to which reference is made is The Family of God: A Symbolic Study of Christian Life in America (New Haven: Yale University Press, 1961; especially part III). On the civil religion, the best analysis is Robert N. Bellah, "Civil Religion in America," (Daedalus [Journal of the American Academy of Arts and Sciences], Winter 1967, pp. 1-21). The notes in Death will provide documentation for most of the other historical assertions herein made.

PLAINTIFFS' EXHIBIT 1-A

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College of Law, University of Cincinnati, 1953-55
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Episcopal Theological School, B. D. (Honors), 1960
Yale University (Graduate Department of Religious Studies)
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Ph.D., 1963 (thesis: "The Eschatology of the Anglo-Saxon Homilists," dir.: J. J. Pelikan)

Academic positions:
The Wooster School, Danbury, Connecticut
Acting Chaplain and Master in Latin, 1963-64
Shimer College, Mount Carroll, Illinois
Chaplain and Member of Humanities Faculty, 1964-66
Chairman, Humanities Faculty, 1966-67
Northern Illinois University, DeKalb
Associate Professor of English and Acting Director of Graduate Studies, 1967-68
University of Missouri, Columbia
Associate Professor of English, 1968-72
Professor of English, 1972-
Chairman, Department of English, 1971-74
(Committes include Affirmative Action, Arts & Science Personnel, Graduate Senate, Museums)

Honors, etc.
Senior Fellow, National Endowment for the Humanities, 1974-75
Fellow, Episcopal Church Foundation, 1960-63
Muller History Prize, ETS, 1960
(listings in biographical dictionaries include Who's Who in the Midwest, Repertoire International des Médiévistes, Directory of American Scholars)

Memberships and offices:

Modern Language Association (Elected member, executive committee for Old English, 1974- ; as President of MMLA, sit on MLA Executive Council)

Midwest Modern Language Association (Vice President, 1973; President, 1974; Member of Executive Committee, 1973-75)

Medieval Academy of America (committee service; book reviews and evaluation of articles for Speculum)

American Society of Church History (article, book reviews, and evaluation of articles for Church History)

Early English Text Society

American Association of University Professors

Invited lectures and papers read at Centre for Mediæval Studies, University of Toronto; University of Rochester; Vanderbilt University; Modern Language Association; International Conference on Patristic Studies (Oxford, 1967, 1971)

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The Year's Work in Old English Studies, sec. V: Old English Prose and Anglo-Latin Literature. annually since 1967 for Old English Newsletter.

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